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No. 14415

United States
Court of Appeals
for the Ninth Circuit

HENRY A. KUCKENBERG, HARRIET KUCKENBERG and LAWRENCE KUCKENBERG, Doing Business as KUCKENBERG CONSTRUCTION CO.,

Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. 9-3-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

Civil No. 5092

HENRY A. KUCKENBERG, HARRIET KUCKENBERG and LAWRENCE KUCKENBERG, d/b/a KUCKENBERG CONSTRUCTION CO.,

Plaintiffs,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Defendants.

PRE-TRIAL ORDER

The above-entitled action came on for pre-trial conference before the Honorable Gus J. Solomon, Judge of the above-entitled Court, on Monday, June 1, 1953, at 10:00 o'clock a.m., in the United States District Courtroom at Portland, Oregon. Plaintiffs appeared by and through Arno H. Denecke, one of their attorneys. Defendant Hartford Accident & Indemnity Company appeared by and through James Arthur Powers, one of its attorneys. Defendant Southern Pacific Company appeared by and through John Gordon Gearin, one of its attorneys.

The following facts were agreed upon among the parties:

Agreed Facts

1. At all times herein concerned plaintiffs Henry A. Kuckenberg, Harriet Kuckenberg and Lawrence Kuckenberg were and are co-partners doing business as Kuckenberg Construction Co. with their office and principal place of business in Multnomah County, Oregon. At all of said times plaintiffs were and are now citizens of the State of Oregon.

2. At all times herein concerned defendant Hartford Accident & Indemnity Company was and is now a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and was and is engaged in the insurance business in the State of Oregon.

3. At all times herein concerned and to and including October 16, 1947, defendant Southern Pacific Company was a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky and authorized to do business and doing business in the State of Oregon as a railroad company. On September 3, 1947, all of the assets of Southern Pacific Company, a Kentucky corporation, were transferred to Southern Pacific Company, a Delaware corporation. On October 16, 1947, Southern Pacific Company, the Kentucky corporation, withdrew from business in the State of Oregon. On December 15, 1947, Southern Pacific Company, the Kentucky corporation, was dissolved. Since September 3, 1947, and at all times referred to in the complaint subsequent thereto, the business

of Southern Pacific Company, the Kentucky corporation, has been and is being conducted by Southern Pacific Company, the Delaware corporation. The parties to the instant controversy having considered Southern Pacific Company as being one corporation during all of the times herein concerned.

4. The amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

5. On or about May 7, 1947, plaintiffs entered into various contracts with the United States of America whereby plaintiffs undertook to and did construct portions of a public highway, sometimes known as the North Santiam Highway, in Marion County, Oregon. A true and correct copy of one of said contracts, 24-A2 is attached hereto, marked plaintiffs' Exhibit .., and made a part hereof together with various specifications and a bid schedule which were made a part of the said contract. The terms and conditions of plaintiffs' Exhibit .., including various said specifications and said bid schedule, were at all times herein concerned known to defendant Hartford Accident & Indemnity Company.

6. On July 2, 1947, plaintiffs entered into a contract with the defendant Southern Pacific Company in respect to certain required insurance and certain construction work involved in this controversy as was expressly required by plaintiffs' said construction contract with the United States of America. The said requirement in the plaintiffs' said con-

struction contract with the United States was in turn expressly required by a prior agreement entered into by the Southern Pacific Company and the State of Oregon, acting by and through its State Highway Commission, dated May 28, 1947, relating to the acquisition by the State of the right to construct highway slopes upon and along certain portions of the said Company's right of way in Marion County, Oregon. Said Commission in turn contracted with the United States Public Roads Administration, an agency of the United States, for the construction of the said highway, and said Administration contracted with the plaintiffs, the contractor, on the behalf of the United States. A true and correct copy of said contract of July 2, 1947, is attached hereto marked plaintiffs' Exhibit .., and made a part hereof.

7. As further required by said construction contract with the United States, plaintiffs on January 26, 1948, formally entered into a contract with the defendant Southern Pacific Company in regard to protecting certain property from damage as a result of said construction work referred to in Plaintiffs' Exhibit 1 above and providing for the reimbursement of the said railroad for certain of said work which said railroad might be required to do. A true and correct copy of said contract of January 26, 1948, is attached hereto, marked Plaintiffs' Exhibit .., and made a part hereof. Said two contracts were at all times herein concerned considered by the

parties hereto as one contract covering the period commencing July 2, 1947.

8. Pursuant to the requirements of the said construction contract, Plaintiffs' Exhibit .., plaintiffs contracted with and did receive from the defendant Hartford Accident & Indemnity Company a bodily injury and property damage liability insurance policy effective April 1, 1947, as modified by certain endorsements to the said policy effective on that date and other endorsements effective subsequently. Effective on July 29, 1948, the defendant Hartford Accident & Indemnity Company cancelled the said policy as provided by the policy and complied in all respects with the said cancellations section of said policy. A true and correct copy of said policy of insurance together with endorsements is attached hereto, marked Plaintiffs' Exhibit ... and made a part hereof. A true and correct copy of said notice of cancellation is attached hereto, marked defendant Hartford's Exhibit .., and made a part hereof.

8a. Defendant Hartford Accident & Indemnity Company issued to the defendant Southern Pacific Company and Western Union Telegraph Company, at the instance and at the cost of the plaintiffs, a policy of insurance No. CL43726, which said policy was in effect May 14, 1947, through May 14, 1948, and that said policy of insurance bore endorsement No. 1 effective May 14, 1947, and endorsement No. 2 effective September 30, 1947, and thereafter said defendant Hartford issued its continuation certificate to said policy and endorsements thereto cov-

ering the period from May 14, 1948, to May 14, 1949.

9. Pursuant to said construction contract, plaintiffs were required to and did work in close proximity to a railroad line of defendant Southern Pacific Company.

10. From on or about June 2, 1947, until on or about July 29, 1948, a period during which the plaintiffs were constructing said highway, property of Southern Pacific Company was damaged. After the completion of the said highway, plaintiffs engaged in certain work of reconditioning said railroad from on or about April 4, 1949, until on or about May 6, 1949.

11. Defendant Hartford Accident & Indemnity Company has denied any liability to the plaintiffs and refused to pay plaintiffs for any amounts allegedly expended by the plaintiffs in respect to the repair of said damage.

12. Plaintiffs have demanded that defendant Southern Pacific Company pay plaintiffs for certain sums so expended by plaintiffs but defendant Southern Pacific Company has refused to pay said sums or any part thereof.

13. Plaintiffs performed work and furnished materials in repairing the property of the defendant Southern Pacific Company during the period commencing on July 1, 1947, and ending on May 6, 1949.

14. Plaintiffs tendered to the defendant Hartford Accident & Indemnity Company on December 1, 1949, the defense of the counterclaim brought by the defendant Southern Pacific Company in the amount of $8,762.16 as evidenced by plaintiffs' Exhibit .., and the defendant Hartford Accident & Indemnity Company on December 7, 1949, refused to assume the defense of said counterclaim on behalf of the plaintiffs.

15. Southern Pacific Company made timely and appropriate demand upon Hartford Accident & Indemnity Company to defend plaintiffs' claim against Southern Pacific Company and tendered the defense thereof of the instant claim to the said defendant Hartford, which refused said tender.

16. Southern Pacific Company made timely and appropriate demand upon defendant Hartford to pay to defendant Southern Pacific Company the amount of its damages in the sum of $8,762.16 but defendant Hartford refused to pay the amount of said damages or any part thereof.

17. Southern Pacific Company made timely and appropriate demand upon the plaintiffs for the payment of Southern Pacific Company's alleged damages in the sum of $8,762.16 but plaintiffs have refused to pay said damages or any part thereof.

18. That the schedule of items consisting of all items of damage claimed by the plaintiffs has been furnished by the plaintiffs to the defendants and

that said schedule contains a full and complete list of the items being claimed in this litigation.

19. That it is agreed that if during the trial the plaintiffs seek a reformation of the various insurance contracts that the reformation so sought shall be in the form heretofore reduced to writing and submitted to the attorneys for the respective parties by plaintiffs' counsel and it is further agreed that plaintiffs, in any event, make their claim for recovery herein on the basis that the items of damage were caused by "accident."

Contentions of the Plaintiffs

1. The plaintiffs contend that they may be obligated to pay for all or part of the damage done to the property of the defendant Southern Pacific Company; this obligation may be because of liability imposed by law, irrespective of any contractual assumption of liability, or by reason of contracts, Plaintiffs' Exhibit .., entered into between the plaintiffs and the defendant Southern Pacific Company whereby the plaintiffs agreed to protect Southern Pacific Company from damage to its property and to reimburse the defendant Southern Pacific Company for the work done by said company in repairing said damage.

2. If the plaintiffs are liable for said damage either by liability imposed by law or by liability assumed by the plaintiffs under contract then, the defendant Hartford Accident & Indemnity Company is obligated by the policy of insurance issued

to the plaintiffs, Plaintiffs' Exhibit .., to pay for the said damage to the defendant Southern Pacific Company's property.

3. If the plaintiffs are held to be liable to the defendant Southern Pacific Company for said damage by reason of the contracts, which are Plaintiffs' Exhibit .., the defendant Hartford Accident & Indemnity Company is liable to the plaintiffs for the amount of said damage by reason of any or all of the following:

(a) Said contracts were part of an easement agreement, Plaintiffs' Exhibit .., and the defendant Hartford Accident & Indemnity Company in the policy in which the plaintiffs are named assureds, Plaintiffs' Exhibit .., insured for liability assumed under an easement agreement.

(b) That on April 1, 1948, the defendant Hartford Accident & Indemnity Company specifically agreed to assume to be obligated for the liability of the plaintiffs assumed under any contracts pertaining to the performance of construction contracts of the plaintiffs.

(c) That it was the mutual intention of the plaintiffs and the defendant Hartford Accident & Indemnity Company at the time the policy naming plaintiffs was effective, Plaintiffs' Exhibit .., namely, April 1, 1947, that said policy of insurance was to insure the plaintiffs against any liability assumed by the plaintiffs pursuant to the provisions of the plaintiffs' contract with the Public Roads

Administration, Plaintiffs' Exhibit .., and if said policy of insurance does not so insure, this error was by mutual mistake of the plaintiffs and the defendant Hartford Accident & Indemnity Company and said policy of insurance should be reformed so that effective April 1, 1947, it insured the plaintiffs for liability assumed by the plaintiffs by contract as required by plaintiffs' contract with the Public Roads Administration, Plaintiffs' Exhibit ...

4. Damage done to the property of the defendant Southern Pacific Company was caused by "accident" as such word is used in the policy of insurance concerned herein.

5. The plaintiffs gave notice of said accidents to the defendant Hartford Accident & Indemnity Company as soon as practicable; the defendant Hartford Accident & Indemnity Company had notice of said accidents; that in the event it is found that plaintiffs did not give said notice and said defendant had no notice the said defendant waived notice of said accidents by denying any coverage therefor under its policies of insurance and by specifically waiving any obligation the plaintiffs may have had in regard to notice.

6. The defendant Hartford Accident & Indemnity Company by denying it was obligated to pay for said damage waived that provision of the policies that no action lies against the said defendant

until final judgment against the plaintiffs or agreement of the defendants herein.

7. That the plaintiffs repaired the property of the Southern Pacific Company in lieu of the defendant Southern Pacific Company's making said repairs and then making claim against the plaintiffs or the defendant Hartford Accident & Indemnity Company therefor in order to mitigate and lessen the amount of the damages to the property of the defendant Southern Pacific Company.

8. That the work performed by the plaintiffs and the materials furnished by the plaintiffs for the repair of the property of the defendant Southern Pacific Company was in the amount of $42,002.66 and said amount is a reasonable amount for said work performed and materials furnished.

9. That in the event the plaintiffs were not liable to the defendant Southern Pacific Company for any or all of the damage to the property of the defendant Southern Pacific Company then the defendant Southern Pacific Company is liable to the plaintiffs for the reasonable value of the repair done by the plaintiffs to the property of the defendant Southern Pacific Company but not in excess of $5,438.99 and that said repairs were furnished at the instance and request of the defendant Southern Pacific Company.

10. In regard to the counterclaim of the defendant Southern Pacific Company plaintiffs were not liable for the damage which was repaired by the

defendant Southern Pacific Company; if the plaintiffs were liable therefor the defendant Hartford Accident & Indemnity Company is obligated therefor by reason of the insurance policy naming the plaintiffs as assureds, Plaintiffs' Exhibit .., and by reason of the policy naming the defendant Southern Pacific Company as assured, plaintiffs' Exhibit ...

10a. That the policy of insurance naming the defendant Southern Pacific Company as named assured, plaintiffs' Exhibit .., is an agreement by the defendant Hartford to pay to the defendant Southern Pacific Company for any damage done to the property of the defendant Southern Pacific Company for which plaintiffs are liable by reason of their contract with the defendant Southern Pacific Company and by reason of the plaintiffs furnishing said policy for the defendant Southern Pacific, the plaintiffs were not liable to the defendant Southern Pacific for said damage and performed the work of repairing said damage for the account of the defendant Hartford in fulfillment of the defendant Hartford's obligation under said policy of insurance to the defendant Southern Pacific.

10b. If the policy of insurance naming the defendant Southern Pacific as assured does not provide as in (10a) above, the provisions therefor are in error and were made by mutual mistake of the defendant Hartford and the plaintiffs and the said policy should be reformed to express the intention of said parties.

11. That the defendant Hartford Accident & Indemnity Company is further liable to the plaintiffs for fees for attorneys of the plaintiffs not to exceed $10,000.00; said liability is pursuant to Section 101-134 O.C.L.A.

12. The defendant Hartford Accident & Indemnity Company is further liable to the plaintiffs for the reasonable expenses, including attorney's fees, incurred by the plaintiffs in defending against the counterclaim brought by the defendant Southern Pacific Company in an amount not to exceed $2,500.00.

Contentions of the Defendant Hartford Accident & Indemnity Company

Defendant Hartford Accident & Indemnity Company admits that it issued a bodily injury and property damage liability insurance policy which was in effect until duly cancelled, effective July 29, 1948, but denies that the facts and circumstances alleged in plaintiffs' contentions invoke the provisions and terms of the said policy so as to impose liability on this defendant for these reasons:

A. Plaintiffs agreed in their contract to take care of the damage they are now making claim for here and were paid an extra consideration to cover the cost of taking care of said damage.

B. Following this provision of their agreement plaintiffs proceeded at their own cost and expense to repair the damage they had caused through their

own operation. Plaintiffs a long time thereafter prepared what appears to be an estimate of their expenses in making such repair, and although compensated for such expenses under their contract, plaintiffs now make claim here against Hartford under a policy of Public Liability insurance to again recover for the items of expense for which they have already been paid by the government under their contract with the government and Southern Pacific.

The items of damage follow a pattern of the same design—a series of similar blasts would blow the blasted rocky material down the mountain gorge onto the Southern Pacific tracks at the bottom of the gorge and damage it; this damage was operational in nature and should have in most instances been protected against by proper safeguards; when such safeguards were not used, the same type of damage occurred repeatedly.

The policy of insurance was written to furnish protection to plaintiffs against liability to third parties arising out of damage to third parties' property when such liability is imposed by law; in other words, against tort liability, when caused by accident.

The series of similar items of damage here were not caused by accident. They were from repeated operations carried on by plaintiff. The items of damage were due to the habit—the habitual operations of plaintiff, and not to accident. The policy

of insurance was written at a low premium and does not cover, nor was it ever intended to cover, plaintiffs' contract liability to the Southern Pacific. Plaintiffs, by their contract (and for which they received extra compensation), first agreed to protect Southern Pacific property from damage, and when plaintiffs failed to so protect, plaintiffs agreed to be liable for the resulting damage.

Specifically, under the terms of the policy, there is no coverage here because:

a. Liability is limited to damage caused by accident.

b. Liability is limited to that imposed by law—i.e., to tort actions as distinguished from an action on contract.

c. Endorsement No. 15 relating to contract coverage, became effective only on and after April 1, 1948, and does not relate to nor cover the items of damage claimed here.

d. The liability of the answering defendant is expressly stated not to include injury to or destruction of property occupied or used by or in the care, custody or control of the plaintiffs or any of their employees.

2. The provisions of the said policy exclude from coverage items of damage which as here merely cover maintenance and repair work by the insured, the plaintiffs here.

3. Condition No. 9 of the said policy relating to

Notice of Accident was breached by the plaintiffs in that the answering defendant was not given written notice as soon as practicable of alleged accident or accidents; and, further, if any such notice was given, it did not contain particulars and information required by said condition.

4. The terms of the policy were violated and particularly condition No. 10 thereof, relating to notice of claim or suit, in that plaintiffs failed to give notice as required, but, on the contrary, plaintiffs, without knowledge or consent of this defendant, entered into an agreement with Southern Pacific, for repairing the items of damage now claimed for and making such arrangement voluntarily and without the consent or knowledge of defendant Hartford; and plaintiffs, by their acts and conduct, which were in violation of the terms of the policy, are estopped for asserting their claims here, and such claims, if they ever existed, were waived. That plaintiffs were merely fulfilling the requirements of their contract which required them, first, to protect Southern Pacific property against damage, and then if they failed to protect it and it was damaged, to stand the cost of repairing such damage.

5. Condition No. 11 of the said policy relating to Assistance and Co-operation of the insured was breached by the plaintiffs in that the alleged items of damage are matters which the plaintiffs, to the prejudice of the answering defendant, have been voluntarily making payments, assuming obligations,

and incurring expenses in connection with the demands of the defendant Southern Pacific Company and further have been disputing with, negotiating with, and counterclaiming against the said defendant.

6. Condition No. 12 of the said policy relating to Action against Company was breached by the plaintiffs in that the plaintiffs have, contrary to an express condition precedent stated therein wrongfully made the answering defendant a party to this action without first having fully complied with all of the terms of the said policy and the plaintiffs have further violated said Condition No. 12 in that plaintiffs have brought suit before the amount of the answering defendant's obligation to pay, if any, was finally determined.

7. In no event are plaintiffs entitled to recover any attorney's fees herein as no foundation has been laid for same, either under the policy or under statutory law, allowing same; and, further, because of the suit against this answering defendant before any final loss had been determined and before plaintiffs had fully complied with the terms of said policy, specifically, but not restricted thereof, plaintiffs failed to comply therewith, as follows:

a. The provisions of the said policy relating to notice of accident as set out aforesaid in paragraph 3; and in no event can attorney's fees be recovered without filing necessary proof of loss which has not been done, nor can attorney's fees be recovered because the plaintiffs themselves are in violation

of the policy, and in particular here where plaintiffs themselves filed the action against the answering defendant before the amount of answering defendant's obligation to pay, if any, was finally determined.

b. The provisions of the said policy relating to notice of claim as set out aforesaid in paragraph 4;

c. The provisions of said policy relating to cooperation of the insured as set out aforesaid in paragraph 5.

9. In any event, the attorneys' fees claimed are excessive and unreasonable.

B. The terms and provisions of the plaintiffs' said construction contract with the United States require the plaintiffs rather than the answering defendant to bear any expenses incurred or damage claims accruing as a result of damage to property of the defendant Southern Pacific Company.

1. The obligation imposed by the said construction contract that the plaintiffs procure certain specified policies of insurance was independent of and distinct from the several other contractual obligations imposed on the plaintiffs in respect to damages by the plaintiffs to the property of the said defendant Southern Pacific Company and said matters for which recovery is sought resulted from plaintiffs' said contractual obligations as hereinafter specified and said matters have no other basis and therefore do not involve the answering defendant in any way.

a. Said construction contract required the plaintiffs to procure certain policies of insurance for the protection of the defendant Southern Pacific Company and said policy relied upon by plaintiffs in their contention was procured to conform to the requirements of the said contract and the said policy was issued by the answering defendant to conform to the requirements of the said construction contract in regard to insurance and in view of the other provisions of the said construction contract.

b. Said construction contract required that all said required policies of insurance conform to the requirements of Works Program General Memorandum No. 32, signed by the Chief of the Bureau of Public Roads and dated January 27, 1937, and such requirements were generally applicable to all highway construction contracts entered into by the said U. S. Bureau of Public Roads or by its successor federal agencies since that date in regard to insurance protection in connection with certain projects involving railroads and here said policy issued by the answering defendant and referred to by the plaintiffs in their contention 1 conformed to the requirements stated in the said memorandum.

c. Separate and distinct from the said provisions of the said construction contract requiring the plaintiffs as contractors to procure the said required insurance policies and because of the special terrain and other conditions attending this said construction project as distinguished from other construction projects involving railroads to which

only said General Memorandum No. 32 was applicable, the said construction contract required that the plaintiffs assume the following special obligations:

(1) That the plaintiffs should protect the defendant Southern Pacific Company against damage to certain of the said defendant's property; and

(2) In the event that the said defendant Southern Pacific Company was required to do any work of the character specified in (a) on account of or for the purpose of accommodating the plaintiffs, the plaintiffs should reimburse the said defendant upon the rendition of bills therefor for all expenses incurred in connection with certain specified repairs; and

(3) That the plaintiffs subject to the supervision and control of the said defendant Southern Pacific Company's Chief Engineer or other designated officer should perform their work in such manner and at such times as that said work shall not endanger or interfere with the safe operations of the tracks and property of the said defendant and the traffic moving on said tracks or other property of the said defendant, its tenants, or licensees at or in the vicinity of the work.

2. To implement and to supplement the contractual obligations imposed on the plaintiffs and set out in paragraph 1(c) above certain parts of the said construction contract, designated "Special Provisions, Project Oregon 24-A-2" and "P.R.A.

Specifications FP-41 and Revisions in Specifications FP-41 as of July 15, 1941," provided that damage to the said railroad right of way was contemplated by certain construction operations required thereby and that the cost of repairing said damages was to be included in the bid amounts for the various items involved. Specifically, but not restricted thereto, the said special provisions and said specifications provided and the plaintiffs were informed and agreed that:

a. (1) Between Stations 691 + 85 and 714 ± 50, United B, the railway excavation involved was in such close proximity to the said defendant Southern Pacific Company tracks that some interference with the continuous operation of the said railroad and possible damage to its facilities would seem to be unavoidable.

(2) Construction should be performed by methods which would result in the least possible damage to the said adjacent railroad.

(3) Any materials or debris falling onto said adjacent railroad should be removed, and any damage to the said roadbed or track immediately corrected, and specifically, but not restricted thereto, broken rail, damaged ties and fouled ballast should be replaced in a workmanlike manner, and a stock of supplies necessary to make all such repairs should be kept on the project at all times to facilitate said repairs.

(4) The contract unit prices for the various

Unclassified Excavation Units should include full compensation for all special work necessary in blasting and excavation of the material to prevent damage to the railroad and any work necessary in removing debris unavoidably dropped on the roadbed of the said railroad and for a correction of any damages to that facility, and that any damages or costs involved which result from construction operations aforesaid should be at the expense and responsibility of the contractor.

(5) The measurement of yardage to be paid for by the United States should include overbreakage due to slides in common or unclassified excavation when not attributable to the carelessness of the said plaintiffs and further that the said measurement should also include unavoidable overbreakage occurring in material which would classify as solid rock, whether the contract calls for classified or unclassified excavation, to an amount not to exceed 10 per cent of the actual quantity contained within the lines shown on the plans for any 50-foot interval between a station and a half station.

b. (1) A special detour involving principally the alteration of said railroad roadbed opposite and between highway Stations 599 and 509 to carry vehicular traffic in addition to railroad traffic was to be constructed.

(2) Said detour was to be maintained in a workmanlike manner by the said contractor to carry both railroad and vehicular traffic, specifically but

not restricted thereto, said roadbed was to be kept free of debris, smooth and properly compacted and said railroad tracks were to be maintained true to alignment and grade and kept free of rocks and debris and further upon termination of the need for the said roadbed to be used as a special detour, said roadbed was to be restored to its original condition as nearly as possible.

(3) No payment would be made for maintenance or restoration of the said special detour but the work would be considered a necessary part of the cost of the project and covered in other contract items as specified except as to any work required by causes not directly caused by the said contractor's operations.

c. (1) Certain clearing, grubbing, snag removal, roadside cleanup, and other operations which might result in the deposit of trees, stumps, or other material on the said roadbed or in damage to the said railroad's property were to be conducted by said contractor.

(2) Bid prices for each of the items specified in (1) above should cover the complete cost of the removal and disposal of the said trees, stumps, or other material aforesaid.

In the alternative the plaintiffs contend:

(2) That from on or about August 1, 1947, until on or about August 1, 1948, the defendant Southern Pacific Company requested of the plaintiffs that plaintiffs repair damage to defendant Southern Pa-

cific's track roadbed, equipment and other personal property and to preserve the same. That at said request the plaintiffs furnished materials and performed labor in fulfillment of the request of the defendant Southern Pacific.

With regard to defendant Southern Pacific's counterclaim, the plaintiffs contend that in the event that the defendant Southern Pacific Company was damaged as alleged in its counterclaim that the plaintiffs had no tort liability therefor and assume no liability therefor by any contract or agreement.

Plaintiffs further contend that by reason of plaintiffs procuring, at their expense, a policy of insurance by which the defendant Southern Pacific was insured against damage to its property up to the amount of $50,000.00, that the plaintiffs have no duty to the defendant Southern Pacific under the terms of the supplemental agreement entered into by the parties on January 26, 1948, to protect defendant Southern Pacific against damage to its property until and unless said damage exceeds the sum of $50,000.00.

With respect to plaintiffs' 2:

Defendant Hartford Accident & Indemnity Company admits that it issued an owners' and contractors' protective public liability and property damage policy in favor of the defendant Southern Pacific Company as insured at the request of and at the expense of the plaintiffs.

The defendant Hartford denies that the facts and circumstances alleged in plaintiffs' contentions invoke the terms and provisions of the policy naming the Southern Pacific as an insured so as to impose liability on the defendant Hartford for the following reasons:

A. The terms and provisions of the said policy were not met and were violated in the following respects:

1. Insuring Agreement II, Property Damage Liability, of the said policy is inapplicable here since the liability of the answering defendant is expressly limited to liability imposed upon the said insured Southern Pacific Company by law for damages because of injury to or destruction of property and said liability relates only to third party claims arising out of torts committed by the said insured and the counterclaim of the said insured are not such claims but are claims to reimburse the said insured for certain expenses incurred by the said insured for work performed and materials used in repairing damage to the said insured's property.

2. Under Insuring Agreement II, Property Damage Liability, of the said policy, the liability of the answering defendant is expressly excluded from extending to liability for injury to or destruction of property owned or rented by the said insured or in the care, custody or control of the insured and here plaintiffs contend that said insured's counterclaim is for damage to property of the said insured.

3. Insuring Agreement II, Property Damage Liability, of the said policy is inapplicable here since the liability of the answering defendant is expressly limited to damages caused by accident and the damages alleged by the defendant Southern Pacific Company for which recovery is sought in its counterclaim were not caused by accident but were the foreseen and contemplated result of certain construction operations of the plaintiffs, which operations were purposely and deliberately carried out by servants of the plaintiffs or otherwise pursuant to the instructions of or with the approbation of the plaintiffs, and, further, that the "term" accident as used in the said policy has a more restricted meaning than "occurrence" and is not used synonymously therewith.

4. The liability of the answering defendant is expressly excluded from extending to operations performed by the said insured Southern Pacific Company or any of its employees and the expenses for which the defendant Southern Pacific Company have counterclaims were for operations performed by the said defendant Southern Pacific Company and its employees and were not for the general supervision work covered by the said policy and performed for the said insured by independent contractors.

5a. The liability of the answering defendant is expressly excluded from extending to liability assumed by the said insured under any contract or agreement and the said insured entered into an

agreement with the plaintiffs providing that certain repair work of the kind for which the said insured here counterclaims should be done by the said insured and therefore all such claims being based on contract with plaintiffs are not covered by the said policy.

b. The plaintiffs' obligations under the supplemental agreement allegedly of January 26, 1948, were separate and distinct from the obligation satisfied by the said policy and relate to other matters and the obtaining of the said policy in no way impaired the obligations assumed by the plaintiffs under certain agreements, including the supplemental agreement allegedly of January 26, 1948, and the said agreements required the plaintiffs to reimburse the defendant Southern Pacific Company for expenses incurred as a result of damages caused by the plaintiffs' operations and for which expenses the defendant Southern Pacific Company here counterclaims and said reimbursement was to be without credit to or offset of any sort for the said policy.

c. The said policy was required by the said construction contract which contract required insurance policy to conform to the requirements of Works Program General Memorandum No. 32, signed by the Chief of the Bureau of Public Roads and dated January 27, 1937, and such requirements were generally applicable to all highway construction contracts entered into by the said U. S. Bureau of Public Roads or by its successor federal agencies

since that date in regard to insurance protection in connection with certain projects involving railroads and here said policy issued by the answering defendant and referred to by the plaintiffs in their contention 2 conformed to the requirements stated in the said memorandum.

d. Said agreements referred to in paragraph B above and in particular the said agreement allegedly first agreed to on January 26, 1948, were not generally applicable to all highway construction contracts entered into by the said U. S. Bureau of Public Roads or its successor federal agencies involving railroads to which said General Memorandum No. 32 was applicable but said agreements were specially provided for in order to reimburse the defendant Southern Pacific Company for repair work on account of the anticipated damage to the said defendant's property as a result of special terrain and other conditions where the said highway was to be constructed.

e. Said supplemental agreement which plaintiffs contend was entered into January 26, 1948, was in fact set out in "Special Provisions, Project 24-A2," which were a part of the said construction contract entered into by the plaintiffs with the United States and the said special provisions required the plaintiffs to enter into a written agreement with the defendant Southern Pacific Company which the plaintiffs did on July 2, 1947, but the said parties through inadvertence or otherwise neglected to include the final paragraph of the required contract

until January 26, 1948, but the plaintiffs upon the award of the said construction contract became obliged to perform all of the obligations contained in the said required agreement with the defendant Southern Pacific Company irrespective of whether or not the plaintiffs and defendant Southern Pacific Company did in fact formally enter such an agreement since the said defendant Southern Pacific Company was a beneficiary of the said agreement contained in the said construction contract entered into by the plaintiffs and the United States and, further, the plaintiffs cannot take any advantage from the fact that they wrongfully neglected to carry out the obligation imposed by the said construction contract to enter the whole of the said agreement with the said defendant Southern Pacific Company within a reasonable time after the award of the said construction contract and said wrongful omission was duly corrected at the request of the United States Public Roads Administration, an agency of the United States supervising the construction of the said highway and further prior to January 26, 1948, the plaintiffs and the said defendant Southern Pacific Company had in fact agreed to provision formally entered into on that said date.

3. The answering defendant denies that plaintiffs had no liability to the said defendant Southern Pacific Company for the damage alleged in the counterclaim of the said defendant and contends that the plaintiffs were in fact liable to the said defendant

for wilfully and deliberately damaging the property of the said defendant as a necessary and contemplated result of constructing the said highway in the location required by the plaintiffs said construction contract with the United States and said construction contract required the plaintiffs in their said bid prices to allow for such damage to the property of said defendant and the plaintiffs did so allow and the said insurance policy in no case covers liability imposed upon the plaintiffs by law but only liability imposed by law on the said insured Southern Pacific Company and any of said damage was not caused by "accident."

4. In any case, since the defendant Hartford's liability is only as an insurer, its liability is only secondary and derived, therefore, the defendant Hartford could not be liable unless the plaintiffs were liable primarily.

Contentions of Southern Pacific Company

1. It is the contention of defendant Southern Pacific Company that all the work performed and material furnished by plaintiffs were work and materials which the plaintiffs were obligated to perform or to pay for by reason of the contracts between plaintiffs and Southern Pacific Company.

2. Plaintiffs' operations were negligently or intentionally conducted and the damages sustained by Southern Pacific Company were occasioned solely and proximately by the aforesaid conduct on the part of the plaintiffs.

(a) As a corollary to contention No. 2 it is the position of defendant Southern Pacific Company that by reason of blasting by the plaintiffs, absolute liability is imposed regardless of whether the damage resulted from the negligent or intentional conduct on the part of the plaintiffs.

3. The damages sustained by defendant Southern Pacific Company were within the risks insured against by the policy of insurance procured by plaintiffs with Hartford Accident & Indemnity Company which, by the terms of said policy, was obligated to defend the present action on behalf of Southern Pacific Company and to pay the claims of plaintiffs.

(a) As a corollary to contention No. 3, it is the position of defendant Southern Pacific Company that Hartford Accident & Indemnity Company had been requested by defendant Southern Pacific Company to defend said action in accordance with the terms of the policy and that by reason of the failure of said Hartford Accident & Indemnity Company so to do there has been a breach of said contract of insurance and that Hartford Accident & Indemnity Company is liable to defendant Southern Pacific Company for all costs and expenses incurred in defending said action and the claims of plaintiffs, together with reasonable attorneys' fees in the amount of $5,000.

(b) As a further corollary to contention No. 3, it is the position of Southern Pacific Company that

the failure of Hartford Accident & Indemnity Company to defend this action on behalf of Southern Pacific Company is a breach of said policy of insurance and that said Hartford Accident & Indemnity Company is liable to Southern Pacific Company regardless of the ultimate outcome of the instant litigation for its costs and attorneys' fees for defending against plaintiffs' claim in the sum of $5,000.

4. It is the contention of Southern Pacific Company that in the event Hartford Accident & Indemnity Company is not liable to Southern Pacific Company under said policy of insurance, then the plaintiffs have breached their agreement with Southern Pacific Company by failing to procure the type of insurance which would protect Southern Pacific Company as required by said contract.

(a) As a corollary to contention No. 4, it is the position of Southern Pacific Company that in the event Hartford Accident & Indemnity Company is not liable to Southern Pacific Company under the said policy of insurance and in the further event that plaintiffs have not breached their contract by failing to procure the type of insurance which would protect the Southern Pacific Company as required by the contract between plaintiffs and Southern Pacific Company, then and in that event it is the position of Southern Pacific Company that it is a third party beneficiary under the contract between plaintiffs and the United States Government

(Public Roads Administration), which said contract requires that plaintiffs furnish adequate insurance coverage to defendant Southern Pacific Company to protect it against the damages which plaintiffs seek.

5. It is the contention of defendant Southern Pacific Company that Hartford Accident & Indemnity Company is bound and required by the terms of its policy issued to Southern Pacific Company and the Western Union Telegraph Company, policy No. CL-43726, to pay directly to Southern Pacific Company the amount of its damages as aforesaid and because of the failure of Hartford Accident & Indemnity Company to pay said damages, defendant Southern Pacific Company is entitled in the alternative to recover said damages from said Hartford Accident & Indemnity Company, together with all costs, disbursements and expenses, including reasonable attorneys' fees in the sum of $2,500.

6. It is the contention of Southern Pacific Company as set forth in its counterclaim that it was damaged in the sum of $8,762.16 by way of expenses incurred in repairing damage to its roadbed, ballast, ties and track and delay to trains (by order of June 2, 1953, W. Bishop) and that plaintiffs are obligated to pay this amount to the Southern Pacific Company.

Further Contentions of Defendant Hartford Accident and Indemnity Company to Contentions of Co-Defendant Southern Pacific Company.

1. The Hartford Accident and Indemnity Company denies that it has any liability to the Southern Pacific Company under either of the policies of insurance mentioned.

2. The Hartford agrees with the contention made by the Defendant Southern Pacific Company that the work performed and materials furnished by plaintiffs was all done pursuant to contracts between plaintiffs and Southern Pacific Company and for which the plaintiffs were expressly obligated to perform and to pay for.

3. The Hartford denies it has any obligation to defendant Southern Pacific Company for attorney fees with respect to either of the policies referred to.

4. The Hartford admits that it was requested by Defendant Southern Pacific Company to defend the original action filed against it herein and that it refused to do so on the grounds that it had no liability. The Hartford contends that the entire matter was one arising out of contract between the Southern Pacific Company and the plaintiffs for which the plaintiffs are liable to the Southern Pacific under their contractual obligation, and that there is no question of insurance involved. That the main action by the plaintiffs against the Southern Pacific and the Southern Pacific's counterclaim against the plaintiffs are direct contractual obligations by them and not covered by the policy.

Issues to Be Determined

1. For what items of damage were the plaintiffs liable to the defendant Southern Pacific?

2. As to those items for which the plaintiffs were liable, was their liability for said damages by reason of an obligation imposed by law, irrespective of contract, or by reason only of a liability assumed by the plaintiffs in a contract or contracts?

3. If the plaintiffs' liability for said damage was only by reason of a liability assumed by contract were the contract or contracts by which such liability was assumed easement agreements or a part of an easement agreement within the meaning of the phrase easement agreement as contained within the meaning of the insurance policy, plaintiffs' exhibit ...

4. On April 1, 1948, did the defendant Hartford insure the plaintiffs against all liability caused by accident and assumed by the plaintiffs by contract and occurring thereafter?

5. If the insurance policy, plaintiffs' exhibit .., did not insure against liability assumed by contract, was this due to the mutual mistake of the plaintiffs and the defendant Hartford and did said parties intend to insure against all liability assumed by contract and should the insurance policy, plaintiffs' exhibit .., be reformed accordingly?

6. Was the damage to the property of the Southern Pacific for which the plaintiffs claim reimbursement and for which defendant Southern Pa-

cific claims reimbursement in its counterclaim damaged by "accident" as that word is used in the insurance policies (plaintiffs' Exhibit . .)?

6a. Was the damage to the property of the Southern Pacific done by the plaintiffs caused by reason of the plaintiffs' negligence, intentional acts, or by acts for which the plaintiffs would be held liable in law absolutely without regard to any fault?

6b. Were all or part of the items of damages claimed by the plaintiffs and the defendant Southern Pacific operational in character, reasonably foreseeable and within the contemplation of the parties when the plaintiffs entered into their contracts for the construction work? (Plaintiffs contend this issue is irrelevant.)

7. Was notice for said damage given by the plaintiffs to the defendant Hartford as required by the terms of Hartford's policy of insurance and if not, did defendant Hartford waive the giving of such notice?

8. Did the defendant Hartford actually have reasonable notice of said damage?

9. Did the defendant Hartford waive that provision of the policy, plaintiffs' exhibit . ., that no action lies against the defendant Hartford until final judgment against the plaintiffs has been had or by agreement of the defendant by the defendant Hartford's denial that it was obligated to pay for said damage?

9a. Are the plaintiffs by their acts and conducts with respect to all or part of the items of damages claimed estopped from bringing this action against the defendant Hartford?

9b. Have the plaintiffs waived any claim for any or all of the items of damages in which they might otherwise have had?

9c. Did the plaintiffs violate the terms and conditions of said policy of insurance in the manner specified in defendant Hartford's contentions?

9d. Did the plaintiffs make voluntary payment for any or all of the items of damage claimed and without the approval and consent of defendant Hartford?

9e. Did plaintiffs receive extra compensation under their contract to cover the expense of protecting against the items of damage in question? (Plaintiffs contend this issue is irrelevant.)

9f. Did plaintiffs receive extra compensation under the contract to cover the expense of repairing the items of damage, some of which they are now claiming? (Plaintiffs contend this issue is irrelevant.)

9g. Did the plaintiffs and Southern Pacific enter into an agreement whereby the plaintiffs undertook at their own cost and expense to repair all or part of the items of damage claimed, and if so was this done without the consent and approval of the defendant Hartford?

9h. Did plaintiffs under their contracts with the government and the defendant Southern Pacific assume responsibility for the items of damage claimed for and agree to pay defendant Southern Pacific Company for such items of damage. (Plaintiffs contend this issue is irrelevant.)

10. Did the plaintiffs perform some repair work on the property of the defendant Southern Pacific for which the plaintiffs were not liable and is the defendant Southern Pacific liable to the plaintiffs for the reasonable cost of said repairs?

11. Were the plaintiffs liable to the defendant Southern Pacific for repairs alleged to be performed by the defendant Southern Pacific in their counterclaim, and, if so, is the defendant Hartford obligated to the plaintiffs therefor by reason of insurance policies, plaintiffs exhibits Nos. .. and ..?

12. Is the policy of insurance naming the defendant Southern Pacific Company as named assured, plaintiffs' exhibit .., an agreement by the defendant Hartford to pay to the defendant Southern Pacific for any damage done to the defendant Southern Pacific for which the plaintiffs are liable by reason of their contract with the defendant Southern Pacific and does said policy render the defendant Hartford primarily liable to the defendant Southern Pacific and the plaintiffs only secondarily liable for said damage?

13. Were the plaintiffs in repairing the damage to the property of the Southern Pacific Company

performing the work for the account of the defendant Hartford in fulfillment of the defendant Hartford's obligation under said policy of insurance naming the Southern Pacific the named assured, plaintiffs' exhibit . . ?

14. If said policy of insurance naming the Southern Pacific as named assured, plaintiffs' exhibit . ., does not provide as plaintiffs contend above, was the failure to so provide one made by mutual mistake of the defendant Hartford and the plaintiffs, and, if so, should said policy be reformed to express the intention of the parties as set out in plaintiffs' contention above?

15. Is the defendant Hartford liable to the plaintiffs for reasonable attorneys' fees in prosecuting this action and in defending the counterclaim inserted by the defendant Southern Pacific?

16. Were the damages sustained by Southern Pacific Company occasioned by the negligence or by the intentional conduct of the plaintiffs?

17. Were the damages sustained by defendant Southern Pacific Company within the risk insured against by the policy of insurance procured by plaintiffs with defendant Hartford?

18. Was defendant Hartford obligated to defend the present action on behalf of defendant Southern Pacific Company and to pay the claims, if any, of the plaintiffs?

19. Has there been a breach of said contract of

insurance by defendant Hartford and is that company liable to defendant Southern Pacific Company for all costs and expenses incurred in defending said action and the claims of plaintiffs, together with reasonable attorneys' fees?

20. Has there been a breach of said policy of insurance by defendant Hartford and is that company liable to defendant Southern Pacific Company regardless of the ultimate outcome of plaintiffs' claim against defendant Southern Pacific Company for defendant Southern Pacific Company's costs and attorneys' fees incurred in defending plaintiffs' claims?

21. Have plaintiffs breached their agreement with Southern Pacific Company by failing to procure the type of insurance which would protect that defendant as required by the contract between plaintiffs and Southern Pacific Company?

22. Is Southern Pacific Company a third party beneficiary under the contract between plaintiffs and the United States of America (Public Roads Administration)?

23. Did the contract between plaintiffs and the United States of America (Public Roads Administration) require plaintiffs to furnish adequate insurance coverage to protect defendant Southern Pacific Company against the damages which plaintiffs now seek to recover from defendant Southern Pacific Company?

24. Are plaintiffs obligated to pay defendant's damages and expenses incurred in repairing damage to its roadbed, ballast, ties and tracks?

25. Is defendant Hartford bound and required by the terms of its policy issued to Southern Pacific Company to pay directly to defendant Southern Pacific Company the amount of its damages?

26. Is defendant Southern Pacific Company entitled by reason of the failure of defendant Hartford to pay its damages to recover said damages from defendant Hartford, together with all costs, disbursements and expenses, including reasonable attorneys' fees?

Exhibits

The following exhibits have been displayed by the parties, respectively, and are enumerated below. No further identification or authentication will be required at the trial:

Plaintiffs' Exhibits

1. Proposal and contract, Oregon Forest Highway Project 24-A2.

2. Insurance policy, LCX2708 with endorsements, Kuckenberg Construction Company, assured.

3. Insurance policy, CL43726 with endorsements, Southern Pacific and Western Union assured.

4. Contract between Southern Pacific and Kuckenberg Construction Co., dated 2 July, 1947.

5. Supplemental agreement between Southern Pacific and Kuckenberg Construction, dated 26 January, 1948.

6. Copy of contract between Southern Pacific and State of Oregon, dated 28 May, 1947.

7. Letter West to Krill, November 3, 1947.

8. Letter Krill to West, November 12, 1947.

9. Copy of telegram Krill to West, December 22, 1947.

10. Letter West to Krill, December 22, 1947.

11. Letter Forbes to Baldwin, April 12, 1948.

12. Forbes' report, dated May 10, 1948, and transmitted by letter April 12, 1948.

13. Letter Krill to Posey, May 15, 1948.

14. Letter Krill to Posey, July 7, 1948.

15. Letter Krill to Hitchings, April 5, 1948.

16. Letter Jewett, Barton, Leavy & Kern to Kuckenberg Construction Co., April 15, 1948.

17. Deposition of Louis J. Krill.

18. Plans for contract 24-A2.

19. Plans for contract 24-A4, B4.

20. Plans for contract 24-A3.

21. Plans for contract 24-B3, Unit 1.

22. Job diary, October 13, first entry.

23. Lind's diary, January 2, first entry.

24. Foreman's time reports.

25. a-g Large photos.

26. a-i Small photos.

The issue of the amount of the damages claimed by the plaintiffs and the defendant Southern Pacific will be reserved until after such time as the Court shall have entered its decision on the questions of what parties, if any, are liable for said damages, and on the question of the amount of the damages the parties may, if they desire, present a supplemental pre-trial order.

The parties hereto agree to the foregoing pre-trial order, and the Court being fully advised in the premises:

Now Orders that the foregoing pre-trial order shall not be amended except by consent of both parties or to prevent manifest injustice; and

It Is Further Ordered that the pre-trial order supersedes all pleadings; and

It Is Further Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between plaintiff and defendant hereinabove stated shall be had.

Dated this 1st day of June, 1953.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ ARNO H. DENECKE,
Of Attorneys for Defendant
Southern Pacific Company.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant
Southern Pacific Company.

/s/ JAMES ARTHUR POWERS,
Of Attorneys for Defendant Hartford Accident & Indemnity Co.

[Endorsed]: Filed June 1, 1953.

(Copy)

[Title of District Court and Cause.]

ORAL OPINION

August 6, 1953

I have read and considered the briefs and the cases therein cited filed by both plaintiffs and the defendant Hartford Accident & Indemnity Company on the issue of whether the damages sought to be recovered were "caused by accident" within the meaning of the policy of liability insurance issued by such defendant.

I am now more convinced than ever that the damages in any of the three categories enumerated by plaintiffs for which recovery is sought were operational and not accidental within the meaning of the defendant Hartford's policy or as those terms are popularly understood.

Defendant Hartford may, therefore, submit Findings of Fact, Conclusions of Law and a Judgment in its favor on this phase of the case.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for final pretrial on June 1, 1953, and for trial on June 1 and 2, 1953, on the issue as to whether or not the items of damage to property of defendant Southern Pacific Company following the road-building operations of plaintiffs occurred by "accident" within the coverage of certain insurance policies issued by defendant Hartford Accident and Indemnity Company to plaintiffs and to defendant Southern Pacific Company. Plaintiffs appeared by and through Arno H. Denecke, one of their attorneys. Defendant Hartford Accident and Indemnity Company appeared by and through James Arthur Powers, its attorney. Defendant Southern Pacific Company appeared by and through John Gordon Gearin, one of its attorneys.

And now the Court, having heard and considered the evidence in the matters above set forth, including the exhibits of the parties, and the statements and written briefs of counsel and having rendered its oral opinion on August 6, 1953, and being fully advised in the premises, does hereby make its separate Findings of Fact and Conclusions of Law:

Findings of Fact

I.

At all times herein concerned plaintiffs Harry A. Kuckenberg, Harriet Kuckenberg and Lawrence

Kuckenberg were and are co-partners doing business as Kuckenberg Construction Co. with their office and principal place of business in Multnomah County, Oregon. At all of said times plaintiffs were and are now citizens of the State of Oregon.

II.

At all times herein concerned defendant Hartford Accident & Indemnity Company was and is now a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and was and is engaged in the insurance business in the State of Oregon.

III.

At all times herein concerned and to and including October 16, 1947, defendant Southern Pacific Company was a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky and authorized to do business and doing business in the State of Oregon as a railroad company. On September 3, 1947, all of the assets of Southern Pacific Company, a Kentucky corporation, were transferred to Southern Pacific Company, a Delaware corporation. On October 16, 1947, Southern Pacific Company, the Kentucky corporation, withdrew from business in the State of Oregon. On December 15, 1947, Southern Pacific Company, the Kentucky corporation, was dissolved. Since September 3, 1947, and at all times referred to in the complaint subsequent thereto, the business of Southern Pacific Company, the Kentucky corporation, has been and is being conducted by Southern

Pacific Company, the Delaware corporation. Southern Pacific Company is regarded as being one corporation during all of the times herein concerned.

IV.

The amount in controversy exceeds, exclusive of interests and costs, the sum of $3,000.00.

V.

On or about May 7, 1947, plaintiffs entered into various contracts with the United States of America whereby plaintiffs undertook to and did construct portions of a public highway, sometimes known as the North Santiam Highway, in Marion County, Oregon. Said contract, being Oregon Forest Highway Project 24-A2, contained among other provisions the following:

Proposal and Contract, Oregon Forest Highway Project 24-A2 Public Convenience and Safety (p. D-6).

"Between Stations 691 ± 85 and 714 ± 50, Unit B, the roadway excavation involved is in such close proximity to the railway company tracks that some interference with the continuous operation of the railroad and possible damage to its facilities would seem to be unavoidable. At this or any other points where similar conditions exist the contractor shall keep the engineer and the railway company fully informed in advance of his plans and shall cooperate in their modification and execution to the end that such unavoidable interference and/or

damage may be held to a minimum. Railroad operation shall be restored at the earliest practicable moment either by temporary shoofly construction or by restoration of the now existing condition. Any damages or costs involved which result from such construction operations shall be at the expense and responsibility of the contractor."

Protection of Railroad and Existing Highway During Construction (p. D-9) :

"Construction shall be performed by methods which will result in the least possible damage to the adjacent railroad and to the existing road. Blasting shall be done in such manner that the materials will, so far as practicable, remain in place within the proposed road prism. Any materials or debris falling onto either facility shall be removed, and any damage to the roadbed or track immediately corrected. Broken rail, damaged ties and fouled ballast shall be replaced in a workmanlike manner. A stock of ties, rail, telephone and telegraph line and supplementary supplies shall be kept in stock on the project at all times to facilitate repairs.

"The contract unit price shall include full compensation for all special work necessary in blasting and excavation of the material to prevent damage to the railroad and any work necessary in removing debris unavoidably dropped on the roadbeds of the railroad and existing highway and for the correction of any damages to those facilities or to the telephone and telegraph lines."

VI.

On July 2, 1947, plaintiffs entered into a contract with the defendant Southern Pacific Company in respect to certain required insurance and certain construction work involved in this controversy as was expressly required by plaintiffs' said construction contract with the United States of America. The said requirement in the plaintiffs' said construction contract with the United States was in turn expressly required by a prior agreement entered into by the Southern Pacific Company and the State of Oregon, acting by and through its State Highway Commission, dated May 28, 1947, relating to the acquisition by the State of the right to construct highway slopes upon and along certain portions of the said company's right of way in Marion County, Oregon. Said Commission in turn contracted with the United States Public Roads Administration, an agency of the United States, for the construction of the said highway, and said Administration contracted with the plaintiffs, the contractor, on the behalf of the United States.

VII.

As further required by said construction contract with the United States, plaintiffs on January 26, 1948, formally entered into a contract with the defendant Southern Pacific Company in regard to protecting certain property from damage as a result of said construction work and providing for the reimbursement of the said railroad for certain repair work which said railroad might be required to do

upon its property as a result of plaintiffs' operations. Said contract and that entered into on July 2, 1947, have at all times been considered by the parties hereto as one contract covering the period commencing July 2, 1947. Said contract among other provisions contained the following:

Proposal and Contract, Oregon Forest Highway Project 24-A2 Agreement with Southern Pacific Company (p. D-4):

> "Contractor shall protect Railroad against damage to telegraph, telephone and signal lines (including telegraph and telephone lines of The Western Union Telegraph Company, located upon railroad right of way), roadbed, ballast, ties, and/or track. Any work of this character which railroad may be required to do on account of or for the purpose of accommodating the work of Contractor shall be done by Railroad at the expense of Contractor, and Contractor shall reimburse Railroad upon rendition of bills therefor for all expense incurred by it in: (a) repairing damage to railroad structures, telephone, telegraph and signal lines (including telephone and telegraph lines of The Western Union Telegraph Company located upon Railroad property), and (b) repairing damage to roadbed, ballast, ties and/or track."

VIII.

Pursuant to the requirements of the said contract with defendant Southern Pacific Company referred

to in paragraphs VI and VII above, plaintiffs contracted with and did receive from the defendant Hartford Accident & Indemnity Company a bodily injury and property damage liability insurance policy, No. LCX-2708, effective April 1, 1947, as modified by certain endorsements to the said policy effective on that date and other endorsements effective subsequently.

Said policy contained among other provisions an endorsement dated March 28, 1947, and entitled, "Property Damage Other Than Automobile," and containing among its other provisions the following language setting forth the obligation of defendant Hartford Accident & Indemnity Company to plaintiffs:

> "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined in the policy for damages because of injuries to or destruction of property, including loss of use thereof, caused by accident, * * *"

Effective on July 29, 1948, the defendant Hartford Accident & Indemnity Company duly and properly cancelled the said policy as provided for therein.

IX.

Defendant Hartford Accident & Indemnity Company issued to defendant Southern Pacific Company and to Western Union Telegraph Company, at the instance and at the cost of plaintiffs, a policy of

insurance No. CL-43726, which policy was in effect May 14, 1947, through May 14, 1948. Said policy bore endorsement No. 1, effective May 14, 1947, and endorsement No. 2, effective September 30, 1947. Said Defendant Hartford thereafter issued its continuation certificate to said policy and its endorsements for the period from May 14, 1948, to May 14, 1949.

Said policy among other provisions contained the following insuring agreement:

> "To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon the Insured by law for damages because of injury to or the destruction of property, caused by accident * * *"

Endorsement No. 1 thereto provided that the term property should include property of and in the custody of defendant Southern Pacific Company and Western Union Telegraph Company as well as other property.

X.

Plaintiffs in the performance of said contract worked in close proximity to the railroad line of defendant Southern Pacific Company. From about June 2, 1947, to about July 29, 1948, property of Southern Pacific Company was damaged on numerous occasions as a result of plaintiff's road-construction operations. After the completion of said highway, plaintiffs engaged in certain recondition-

ing work on said railroad from about April 4, 1949, to about May 6, 1949.

XI.

Defendant Hartford Accident & Indemnity Company has denied any liability to plaintiffs under the terms of said policies of insurance referred to in paragraphs VIII and IX above. Said defendant has further refused to pay plaintiffs for any amounts expended by plaintiffs for the repair of said damage. Said defendant has refused to assume the defense of certain claims asserted by defendant Southern Pacific Company against defendant Hartford Accident & Indemnity Company with respect to said damage.

XII.

Defendant Hartford has denied any liability to defendant Southern Pacific Company under its policy referred to in paragraph VIII above for damages resulting from the operations of plaintiffs in constructing said road and has refused to assume the defense of certain claims asserted against defendant Southern Pacific Company by plaintiffs arising out of plaintiffs' road-building operations herein involved.

XIII.

In the areas where damages to property of defendant Southern Pacific Company occurred during the period of said road construction by plaintiffs, plaintiffs worked in close proximity to the railroad line of said defendant, the distance between said

line and plaintiffs' operations varying from about 20 feet to about 600 feet. In all instances, plaintiffs' area of operations when not immediately adjacent to said railroad line were at a higher level on a mountainside above said railroad line of said defendant. Plaintff conducted continuing blasting operations of various intensity during the course of said road construction.

The damages to the property of said defendant occurred as a result of said blasting operations in almost all instances. In the other instances, the damages to said railroad line were the result of earth-moving or tree-cutting operations by plaintiffs. The items of damage claimed for injury to the property here involved was the reasonably anticipated, ordinary and expected result of plaintiff's operations under the circumstances herein presented and did not result from "accident."

XIV.

Plaintiffs alleged in the alternative that their claims against Southern Pacific occurred by accident. The Court finds said claims did not occur by accident within the meaning of the terms of said policy of insurance issued by defendant Hartford Accident and Indemnity Company to Southern Pacific Company; that said company was nonetheless entitled to have said claims defended.

XV.

Defendant Southern Pacific Company made timely demand upon defendant Hartford to defend

plaintiffs' action against it, but said demand was rejected and refused by Hartford Accident and Indemnity Company.

XVI.

The policy of insurance issued by defendant Hartford to Southern Pacific Company provides among other things:

"Insuring Agreement

"III. Defense, Settlement, Supplementary Payments.

"It is further agreed that as respects insurance afforded by this policy the company shall

"(a) defend in his name and behalf any suit against the insured alleging such injury and seeking damages on account thereof, even if such suit is groundless, false or fraudulent * * *"

XVII.

The reasonable value of attorneys' fees incurred by Southern Pacific Company in defending the claims of plaintiffs was and is the sum of $1500.00 and Southern Pacific Company incurred additional expenses in defending said claims by way of costs and disbursements in the reasonable sum of $163.71.

Conclusions of Law

1. The damages and injuries to the track and roadbed of the railroad line of defendant Southern Pacific Company were not caused by accident within the meaning of the terms contained in the various

policies of insurance among and between defendant Hartford Accident and Indemnity Company and plaintiffs, defendant Southern Pacific Company and Western Union Telegraph Company referred to in paragraph VIII of Findings of Fact herein.

2. Defendant Hartford Accident and Indemnity Company is not liable to plaintiffs to pay for the damages and injuries to property of defendant Southern Pacific Company resulting from plaintiffs' road-building operations here involved.

3. Defendant Hartford Accident and Indemnity Company is not required under said policies of insurance to appear and defend on behalf of plaintiffs against actions or claims brought against plaintiffs by defendant Southern Pacific Company for damages resulting from plaintiffs' road-building operations involved herein.

4. Defendant Hartford Accident and Indemnity Company is not liable under said policies of insurance to defendant Southern Pacific Company to pay for any of the damages and injuries to property of said defendant occurring as a result of plaintiffs' road-building operations herein involved.

5. Defendant Hartford is liable under said policies of insurance to appear and defend defendant Southern Pacific Company against plaintiffs' claims against said defendant growing out of or resulting from plaintiffs' road-building operations here involved.

6. Defendant Hartford is liable to defendant Southern Pacific Company for all costs and attorneys' fees incurred by said defendant in defending plaintiffs' claims here involved.

Done at Portland, Oregon this 11th day of March, 1954.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed March 11, 1954.

In the District Court of the United States
for the District of Oregon

Civil No. 5092

HENRY A. KUCKENBERG, HARRIET KUCKENBERG and LAWRENCE KUCKENBERG, dba KUCKENBERG CONSTRUCTION COMPANY,

Plaintiffs,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Defendants.

JUDGMENT

This cause came on regularly for trial on June 1 and 2, 1953, before the Honorable Gus J. Solomon, Judge of the above entitled court, plaintiffs appearing by Arno H. Denecke, one of its attorneys, defendant Hartford Accident & Indemnity Company

by James Arthur Powers, its attorney, and defendant Southern Pacific Company by John Gordon Gearin, one of its attorneys. The Court heard and considered the evidence of the parties, including exhibits admitted herein, and the argument and written briefs submitted by counsel. Pursuant thereto, the Court has on this date made and entered findings of fact and conclusions of law, and now, based thereon, it is hereby

Considered, Ordered and Adjudged that plaintiffs take nothing by this action against defendant Hartford Accident & Indemnity Company and judgment herein is entered in favor of said defendant against plaintiffs, and it is further

Considered, Ordered and Adjudged that defendant Southern Pacific Company take nothing on its counterclaim against defendant Hartford Accident & Indemnity Company and judgment herein is entered against defendant Southern Pacific Company in favor of defendant Hartford Accident & Indemnity Company on said counterclaim, and it is further

Considered, Ordered and Adjudged that defendant Southern Pacific Company have and recover of and from defendant Hartford Accident & Indemnity Company reasonable attorneys' fees in the sum of $1500.00, together with its costs and disbursements incurred herein in the sum of $163.71, and it is further

Considered, Ordered and Adjudged that defendant Hartford Accident & Indemnity Company have

and recover of plaintiffs its costs and disbursements incurred herein, taxed and allowed in the sum of $....., and it is further

Considered, Ordered and Adjudged that there be reserved for further determination the respective claims of plaintiffs against Southern Pacific Company and the counterclaim of said defendant against the plaintiffs.

Done at Portland, Oregon, this 11th day of March, 1954.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed and entered March 11, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs Henry A. Kuckenberg, Harriet Kuckenberg, and Lawrence Kuckenberg, d.b.a. Kuckenberg Construction Co., plaintiffs, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this case on the 11th day of March, 1954 which is as follows:

"It is hereby

"Considered, Ordered and Adjudged that plaintiffs take nothing by this action against defendant Hartford Accident & Indemnity Company and judgment herein is entered in favor of said defendant against plaintiffs, and it is further * * *

"Considered, Ordered and Adjudged that defend-

ant Hartford Accident & Indemnity Company have and recover of plaintiffs its costs and disbursements incurred herein, taxed and allowed in the sum of $....., * * *"

Dated this 9th day of April, 1954.

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY,

By /s/ ARNO H. DENECKE,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed April 9, 1954.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Know All Men by These Presents, That we, Henry A. Kuckenberg, Harriet Kuckenberg and Lawrence Kuckenberg, d.b.a. Kuckenberg Construction Co., plaintiffs, as principals, and Glens Falls Indemnity Company, a corporation, as surety, are held and firmly bound unto Hartford Accident & Indemnity Company, a corporation, defendant, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid the said Hartford Accident & Indemnity Company, or its assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally by these presents. Sealed with our seals and dated this 9th day of April, 1954.

Whereas, on the 11th day of March, 1954, in the United States District Court for the District of Oregon in an action pending in said Court between

said plaintiffs and the said defendant, among others, rendered a judgment for the defendant and against the plaintiffs and for the defendant's costs herein incurred, the said plaintiffs having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid action by appeal to the United States Court of Appeals for the Ninth Circuit.

Now, the Condition of the above obligation is such that if said plaintiffs shall pay the costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if judgement is modified, then the above obligation to be void; or else to remain in full force and virtue.

HENRY A. KUCKENBERG, HARRIET KUCKENBERG and LAWRENCE KUCKENBERG, d.b.a. KUCKENBERG CONSTRUCTION CO.

By /s/ ARNO H. DENECKE,
One of Their Attorneys,
Principals.

[Seal] GLENS FALLS INDEMNITY COMPANY,

By /s/ J. STEWART LEAVY,
Attorney-in-Fact,
Surety.

Countersigned:

JEWETT, BARTON, LEAVY AND KERN,

/s/ J. G. GEARIN.

[Endorsed]: Filed April 9, 1954.

United States District Court
District of Oregon

Civil No. 5092

HENRY A. KUCKENBERG, HARRIET KUCKENBERG and LAWRENCE KUCKENBERG, d.b.a. KUCKENBERG CONSTRUCTION CO.,

Plaintiffs,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Defendants.

Portland, Oregon, June 1, 1953—2:00 P.M.

Before: Honorable Gus J. Solomon,
Judge.

Appearances:

ARNO H. DENECKE,
Of Attorneys for Plaintiff.

JAMES ARTHUR POWERS,
Of Attorneys for Defendant Hartford Accident & Indemnity Company.

JOHN GORDON GEARIN,
Of Attorneys for Defendant Southern Pacific Company.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

(The above entitled cause coming duly on for trial, and counsel for the respective parties having made their opening statements, the following proceedings were had.)

Mr. Denecke: I will call Mr. Lind.

HILDING F. LIND

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Lind, you do work in construction, heavy construction; is that correct? A. Yes, sir.

Q. In 1947 and 1948 you were the superintendent for Kuckenberg Construction Company on the North Santiam job? A. That is correct.

Q. What is your work now, Mr. Lind?

A. Well, I am still in construction.

Q. Who do you work for?

A. Well, I am with C. J. Montag and Sons.

Q. How long have you been working for them?

A. Well, since I left Kuckenberg I have been with them, a year now.

Q. When did you first go to look over this job on the North Santiam?

A. Well, in the spring of 1947, the early spring of 1947.

(Testimony of Hilding F. Lind.)

Q. Do you recall how many contracts there were covering the work that your employer eventually received? A. Four.

Q. With reference to 24-A2, do you have that one in mind? [3*]

A. Unless I am mistaken, the first one from Niagara east, A-2/B-2, I think it is, 24-A2/B-2.

Q. I hand you Plaintiff's Exhibit 18, pre-trial exhibit, which is plans for 24-A2, and after looking at that—— A. Yes, that is it.

Q. On that particular contract, Mr. Lind, would you state generally what contract it was contracted to do?

A. Well, it was the clearing on the road, the roadbed itself. It was the clearing and the excavation, the culvert and bridges, viaducts, and the sloping and the base material. And then on this particular job was a detour—can I go to length to explain how this thing was?

Q. Yes.

A. There is almost a third of the job in length where this particular section did not interfere or come close to the Southern Pacific railroad track, and then right approximately a third of it that the old road was completely relocated. In other words, by saying it was relocated, it was necessary to construct a detour, and all vehicular traffic was run on this detour, which is the lines of the Southern Pacific Railroad, and that was approximately a third of the job. The last third of the job, why,

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

(Testimony of Hilding F. Lind.)

we came off of the railroad track again and back onto the right-of-way of the Bureau or the State Highway Department.

The difference in—when we built the job, and had planned [4] it originally, the first third of the job is pretty much the same as the normal type of work that we did, and where we had no interference at all with traffic, vehicular traffic near the railroad, but also the vehicular traffic because it could be handled without any special detours, but the third section is where the price difference comes in per cubic yard measurement, so it was necessary for a mile and a half to run pilot cars 24 hours a day and to complete a detour on the Southern Pacific tracks.

Also, your traffic had to go through on the detour every 30 minutes, run from each side. Any construction being done above the detour would have to stop and wait while traffic went through. That is where the difference in cost come in this center section.

Q. Mr. Lind, how did the engineers divide up this job? In other words, how did you determine a point on the ground as a point on the chart there? They used stations; did they not?

A. That is right.

Q. Would you explain to the Court, Mr. Lind, generally how the system of stationing works?

A. Well, a station, of course, is a hundred feet. It is just something in an engineering job so that your locations, when you are speaking of a certain

(Testimony of Hilding F. Lind.)

section, that you can locate that easily by a number and the stations. The engineers would give a station of 100 feet. Ten stations would be a [5] thousand feet; 52.80 stations would be a mile.

Q. Am I correct, Mr. Lind, that generally in your work describing where it was and describing various events you would just refer to that in reference to a station; am I correct on that?

A. That is right. I think all engineers and contractors base everything on that.

Q. Mr. Lind, I hand you Plaintiffs' Exhibits 25 and 26 and ask you to look through those photographs and see if you can find one or two which give a pretty good view of the ground covered by this contract 24-A2?

A. This one here is not even on the job. (Indicating photograph.)

Q. I know it.

A. This is at Station 714 approximately. It is about——

Mr. Powers: What is that marked, please?

Mr. Denecke: F. Mr. Lind, perhaps looking at 26(I), is that a fairly comprehensive view of the area covered by this contract?

A. Yes, that is quite true, the old road is there and the new road is above it.

Q. Could you point out on the photograph, Mr. Lind, where is the new road, the old road and the S.P.'s right of way?

A. This is the Santiam River, and as you notice this little slight road here, that is a railroad, a part

(Testimony of Hilding F. Lind.)

of the Southern Pacific Railroad Company here, and this particular place, this [6] is the old highway which is a one-way road with occasional turn-outs here. The new highway is up in here approximately five to eight hundred feet higher than the old road, so, actually, there is a difference here of from here to the railroad track. (Indicating on photograph.)

Mr. Powers: I cannot hear the witness.

The Witness: From the railroad track to the new highway, in this particular case it is probably a thousand feet in this particular picture.

Mr. Powers: You were referring to "I," were you, 26-I?

The Witness: Yes.

Mr. Denecke: That is right.

The Witness: In this particular picture it is a one-way.

Q. (By Mr. Denecke): Could you look through the rest of these, Mr. Lind, and see if there are any others there that describe the job or give a view of the job as a whole rather than individual parts there?

A. Well, this is A-2. We are approximately—I can only go by stations because this is approximately Station 500, and here is where we—about 600 in there. In that particular case your new highway is on the same grade as the railroad, and there would be no damage, if any, in here at all, due to the fact that there was no dynamiting done

(Testimony of Hilding F. Lind.)

here and that we are on the same level as the railroad track. That is what I would call normally ordinary construction work. [7]

The Court: When was this job completed?

The Witness: Well, I think it was in 1949, spring of 1949. This is taken off of the old highway, and in this particular case the old highway is above the new road, and the railroad is down to our left here. I think that is about Station 700.

Q. I will wait, Mr. Lind, until we get to the various parts of it here.

The Court: Was there not a job in that vicinity last year or the year before?

The Witness: No.

Mr. Denecke: Not a road job, your Honor.

The Witness: All work was done that same year, 1949.

The Court: Outside Eugene?

Mr. Denecke: Well, this is in the area between Mill City and, well, Detroit, of course, is the closest, is the construction down there. This is Lookout Dam there—you are correct, your Honor, they are doing a lot of road work there.

Q. How was the road carried on? How did you prepare for the making of the new road?

A. Well, first, of course, clearing the trees, felled and burned, and then the roads are where you could, were pioneered, and the usual construction methods, and then your equipment came in and worked.

(Testimony of Hilding F. Lind.)

Q. When you say the roads were pioneered, what do you mean by that? [8]

A. Oh, by that I mean in the top of some of these cuts you first have to build a road wide enough so as to get your larger grading equipment in, and they are pioneered in around the sides of these cliffs so that you could get in and get to work.

Q. What was the general type of construction that had to be done on this contract? Was it earth, rock or soft rock?

A. Well, it varied. As I said, we had in some sections, the sections were not in the mountains, more or less where the canyon widened out there was the gravel and dirt with some rock that had to be shot. As you reach the proximity of the dam, why, it starts on the upgrade and goes into the mountains there; of course, that is rock, some of it very hard rock.

Q. Mr. Lind, I hand you Exhibit 28 and ask you if you will now state to the Court, taking up these items one by one, how these various elements of damages occurred.

Mr. Powers: This Exhibit 28, I do not remember that right now.

Mr. Denecke: 28 is a statement of events, Mr. Powers, which I sent you a couple of years ago.

Mr. Powers: Is that the list of items you are claiming for?

Mr. Denecke: Prepared by Mr. Lind; that is right.

(Testimony of Hilding F. Lind.)

The Witness: Do you want me to start here?

Q. (By Mr. Denecke): Mr. Lind, it is correct, is it not, that Exhibit 28 is a statement that was prepared on the basis of information supplied by you? [9] A. Yes.

Q. Your information, Mr. Lind, came from your diary—I should say your own check of the time cards of your own people, your diary, and, of course, you were present on the job at all times?

A. Correct.

Q. Referring to August fifth, that is 1947; is it not? A. Yes.

Q. I would prefer, Mr. Lind, that rather than read those that you will just refresh your recollection from what was said at that time and state as——

A. Of Course, I don't remember everything, every incident, you know, now.

Q. I realize that.

A. Well, at Station 680 this is close to Sardine Creek, it is just on the other side of Sardine Creek. Apparently, the rock came down on the track that day. I don't know how much the damages were.

Q. We are not trying to go into that point at this time. A. Yes.

Q. Do you know what caused the rock to come down on the track?

A. Well, any rock before you shoot or anything else, why, you have got to drill holes in it, and then you spring. Commonly in construction work you put a small charge of powder in the hole that you

(Testimony of Hilding F. Lind.)

are going to spring, and you enlarge that by—you enlarge that, depends on the hardness of the rock as to how many times you may have to spring it. You may have to [10] spring it three or four times or maybe twice, and when you do that you shake the ground, cause a vibration, a shaking of the ground within three or four hundred feet of possibly where the hole is.

Well, we were in steep country, and if you are shaking the ground a lot, a log, a rock possibly which has been there for maybe a hundred years, will dislodge and roll downhill and, of course, anything underneath it, if it hits the track it may break it or bend it or it will go down on the highway and block something up so traffic cannot get by.

Now, on August fifth, Station 680, I do not remember this particular rock because we have had lots of them do that, but I have in my diary I was doing some springing, and the rock got dislodged and rolled down on the railroad track, and, of course, it was repaired by us. The time card of the foreman that worked on it is where the expense was originally taken from.

Now, 679, there was no blasting down at that station and, apparently, something caused a rock to roll down the hill. It must have been close to men that were working, but it rolled down the hill, did some damage on the track. Quite often, I might bring into this that even the railroad train, I think the Railroad Company will even admit that, that

(Testimony of Hilding F. Lind.)

the vibration from a train that has been going on passing a certain place would cause a rock ledge to roll down. That is what these [11] maintenance crews have been out there for 25 years, as occasionally taking rock or debris off the right of way that comes down. Of course, in this particular case that we got the job of maintenance of anything that came down regardless of where it came down or how it came down was taken care of by yourself.

The Court: Let me ask a couple questions with reference to one and two. That is for the August fifth and eleventh numbers.

The Witness: Yes.

The Court: Do I understand you correctly that when you blast, by means of drilling, putting the charge in the hole, that you cannot determine any particular mathematical per cent, the amount of rocks that is going to be loosened by that blast?

The Witness: Not entirely, no, you cannot. You can put in—dynamite works by the pounds, as a rule, and you take the textbooks in determining the type of rock it is. It will go all the way to a quarter of a yard a pound as high, and, oh, I have seen rock go as high as a pound and a quarter a yard. That is determined entirely by the type of rock, your Honor. If there are seams or cracks that you cannot see, visible from the surface, maybe in some cases a quarter of a pound would be ample, and half a pound would be too much.

The Court: That is something you cannot tell?

(Testimony of Hilding F. Lind.)

The Witness: You cannot really tell, in other words, there is a certain amount of judgment connected with all of it. [12] Now, we used on that job, our average when we did the job, we figured on about a half a pound a yard, and I think we finished up—I know I went over the costs—and we actually used less dynamite per cubic yard on the job than we had anticipated.

Several factors entered into that. One of them is that the old bridge ran down pretty much the center line of where the new center line of the road is now, and in the old days they used to overshoot an awful lot. They did not have the equipment to move rock material, and they used powder, more of it, and then, naturally, there are a lot of faults that was caused 20 or 25 years ago where rock is jarred much heavier than it should have been.

The Court: Did you visit the location before the job was bid?

The Witness: Yes, sir, I worked within—we had a job previous to this that connected on to this job. I just spent a year in this same location.

The Court: So you knew that there was quite a few seams and faults in the rock that was blasted?

The Witness: A certain amount of them, yes.

The Court: Out of 100 shots a good percentage of them will have results which are not anticipated, is that correct?

The Witness: No, I would not say that it is that correct. No, I would say we moved—to give you an example, we moved close to four and a half

(Testimony of Hilding F. Lind.)

million yards on these jobs, most of that being rock, and of the four and a half million yards [13] that was moved there was probably not over, oh, I would say, twenty thousand yards of that four and a half million that ever didn't go except we didn't expect it. Most of it is not caused by a great quantity of rock. It is caused by a loose rock. In other words, if somebody, as an example, was putting a sewer across the street here and in the near vicinity and there was rocks, they would possibly go entirely around this building without doing any damage at all, but one rock would probably break maybe a picture window that you have here.

The Court: That is something that you cannot determine in advance?

The Witness: You do not control it. That one is an element—you have no control whatsoever over it.

The Court: The theory is to undershoot rather than overshoot to avoid damage?

The Witness: That is right.

The Court: Did you tell me that in connection with the August eleventh occurrence that that may not have been connected with the work at all?

The Witness: That is true. I see here in the note, "no blasting was being done at this location." Now, I would not have put that in there originally because I supported everything by my diary as to where we were working, and we apparently were not shooting there at all.

Now, that may have been caused by, oh, a dozen

(Testimony of Hilding F. Lind.)

different [14] reasons. It may have been caused by springing. It may have been caused by some men walking around and clearing up above the railroad and pulling lumber out and dislodging a big boulder which would roll down the hill and hit a car or hit your railroad track.

The Court: When you say there was no blasting being done at the location, what does that mean, no blasting within a hundred yards or——

The Witness: Oh, no, I would not call it that close. When I say there would be no blasting being done I think, generally I would say within 500 or 600 feet, something like that or anything that might have been caused—I think I would make the difference this way, anything that I thought would be far enough away so that it would not be dislodged by the work they were doing, I would say anything in that area would be blasting in that area.

The Court: Is it true that a shot that is being shot 600 feet away may cause vibrations which would result in a rock loosened?

The Witness: Yes, it could very easily. I have seen it happen many times. I think there has been damage claims collected on jobs where blasting has been done as far as five miles away. I think they have all had experience in that.

The Court: Go ahead, I won't interrupt you.

Q. (By Mr. Denecke): Mr. Lind, when you talk about springing it [15] is a type of blasting, but the only purpose of it is to enlarge your holes?

A. That is right.

(Testimony of Hilding F. Lind.)

Q. So you used the charge in there, but not to break the laws in any way?

A. It is primarily a charge, what we call, you drill the hole, your hole is usually not over, by the time you end it, quit drilling, say, into a bank 20 feet deep, your hole when you are at the bottom of that drill hole is possibly only one and a half inches around. Well, that won't hold enough powder to do any springing in there so what we do, we do springing, in other words, you may put two sticks of powder in that hole and tamp it and then put sand on top of it. What happens is a minor explosion inside the bottom of this hole. When you blow that out, that is, with air, I would say you have a hole there then that would probably hold several or eight sticks and what actually happens is that the powder explodes and burns a little hole in the rock. You can get almost any amount that you want in there and continue to spring until the hole is large enough so that you may get in five hundred pounds. Well, figuring it a half a pound short it should move a thousand yards, in that vicinity—or a hundred yards, in that vicinity, and springing causes the ground to shake.

Q. Mr. Lind, I notice the next one there is on Station 714. I wonder if by use of Exhibits 25-A through 25-F you could explain what occurred there. [16]

Your Honor, this is fairly well illustrated by these particular photographs.

(Testimony of Hilding F. Lind.)

The Court: I want to read your statement first. Then I will know something about it.

Mr. Denecke: Certainly.

The Court: Is there any objection if this exhibit is introduced in evidence, and then the witness will not have to read the statement before he discusses it and the matter is open for cross-examination. I know that some of this is absolutely immaterial. I can see that no liability can be predicated at Station 679 because the witness does not know who caused it. It may be caused by the Southern Pacific, but I do not see how Kuckenberg can recover against the Hartford or Southern Pacific. Even if it were an accident all of the witnesses——

The Witness: Pardon me, your Honor, but there a few things like the small ones. You will understand when I wrote up the time——

Mr. Powers: Excuse me just a minute, please. We would have no objection, your Honor, to the question that you asked with the understanding that the Court will consider the weight of it or lack of weight of it for what it is, and I think that they have the diary here ready, and we can look at it, but two or three——

Mr. Denecke: We only have the diary for [17] 1948.

The Court: Have you any objection?

Mr. Gearin: No.

The Court: When you interrogate this witness you can go ahead and talk to him about the items in Station 714, and I will have read this.

(Testimony of Hilding F. Lind.)

Q. (By Mr. Denecke): Mr. Lind, did you at the time know what caused the damage there?

A. Oh, yes, I did at the time.

The Court: You mean on August eleventh you knew what caused this damage?

The Witness: Well, I would say that there were times on the track here that, where rocks would come down. I might not know what brought a rock down, particularly at that time, but I knew what caused the damage to it. The rock came down.

The Court: I do not understand him.

Mr. Denecke: I am surprised if I understand him, your Honor.

Q. My question, Mr. Lind, is did you know at the time what caused the rock to come down?

A. In most cases I did, yes.

Q. In the first two items here?

A. That is so long ago.

Q. Well, I know, but you can——

A. I cannot separate this particular August 11th. "No blasting was being done yet at this location at this time, and the [18] causes of damage are the same as on August 5th."

Well, on August 5th I had a large boulder fall on the track—well, I might explain myself. At the time I put down that the boulder came and fell on the track, that is what happened. I can't say now that I remember that identical boulder, but I did at the time that I put this down.

The Court: Just listen to what Mr. Denecke is asking you. Try to answer his question. He has got something in mind.

(Testimony of Hilding F. Lind.)

Q. (By Mr. Denecke): Reading this now, Mr. Lind, are you able to state after reading this, is your memory refreshed so that you can state what caused the rock to fall on August 5th?

A. On that particular August 5th?

Q. Yes. A. The springing.

Q. And the same thing is true on August 11th, that date?

A. It apparently is, because I have got down there a boulder came down——

The Court: I do not think that is true, Mr. Denecke.

Mr. Lind, do you recall—in connection with the damage that was done at Station 679 on August 11th, do you know whether that boulder fell because of the springing or the blasting or because of vibration due to the fact that the Southern Pacific ran its lines over there over a period of 20 years? Could you have told on August 11th at the time that the rock fell down? [19]

The Witness: Yes, I think I could have said at the time it came down, definitely.

The Court: You would be able to determine whether or not the damage resulted from vibration over a period of many years or from springing or from blasting or from the fact that men were walking around up there?

The Witness: Well, I would if I had at that particular time, I had the knowledge, because this first one, I say that it was done by springing. On the next day I say it was done by the same causes, and the cause of the damages are the same, so I

(Testimony of Hilding F. Lind.)

assume that that is what happened, is the springing.

The Court: I did not see that last sentence there. When did you examine into this damage? How long after August 11th?

The Witness: Well. I have my daily reports that where we had damages on the track that it was put down on the foreman's report of the damages, and that was done right at the time.

The Court: Do I understand that, through these entries that were made on this exhibit, that you personally examined the damage that was done and made a determination as to what caused the damage?

The Witness: No, I don't think so. I had foremen on the job. I was not all over this thing all the time, and it is true that in practically every case wherever we had trouble on the track I made it a point to find out whether it was from some particular cause, either by working up above [20] or by shooting or springing or clearing or vibration even, so that I would know what happened because we had a crew which was doing nothing but fixing railroad track.

The Court: Sometimes it was pretty difficult to determine the precise cause of the damage, was it not?

The Witness: I agree with you. I think it was at times.

The Court: Then what would you do? Would you make an estimate of the cause based upon facts that you observed and what people told you?

The Witness: Well, I would say normally that

(Testimony of Hilding F. Lind.)

if I was not there and a rock had gone down on the track, why, I would say to the foreman, "Now, where did it come from?" He would say, "Oh, it come off from the bank up there and slid off." Well, if we were working very close to that I would naturally assume that it was caused from vibration by the machine, or if we were springing, I would think it was from springing reasons, or if I didn't know of any other reasons that you could connect with the job, why, then I would say it probably would have come down anyway because there was no connecting it.

Mr. Denecke: There are some instances, your Honor, we are sure exactly what the cause is.

The Witness: If there was something working around there, I think the average person could say, well, it is caused by vibration of a shovel operating, but in some cases, why, it is hard to determine identically what happened because you have [21] no way of knowing what was close to it. You would then say it was a slide. We would call them like that a slide, or you might, would blame it on the weather even, rainfall, or something like that.

Mr. Denecke: Has your Honor had an opportunity to read the August?

The Court: I am going to read it now.

Q. (By Mr. Denecke): Have you read that, Mr. Lind?

A. Yes, I have read it. I remember it.

Q. Mr. Lind, with the use of the photographs here, 25-A through F, could you state to the Court

(Testimony of Hilding F. Lind.)

and show to the Court what occurred at that time? Your Honor, the photographs illustrate fairly——

Mr. Gearin: Which station is this you refer to?

The Witness: 714.

Mr. Denecke: 714, August 24th.

Mr. Gearin: 714?

The Witness: I have two pictures of this one before, and here is one that is after. This first picture shows the——

Mr. Denecke: 25-A?

Mr. Powers: 25-B.

The Witness: The cut that is showed to our bottom and to our right, we can see the railroad track of the Southern Pacific line, and we can see these here are the rails. We can see that there were three or four feet of dirt has been hauled in and [22] placed on top of the railroad track.

Now, we drilled this rock with lifters from down below, and at the spots shown here and ending off up here (indicating), this cut was supposed to have been cut out like that when it was shot, and then the slab was to have been taken out, and under this program we had figured that there would not be enough weight on this with that covering the entire railroad so that the rock would fall on the track and do any excessive damage.

Q. (By Mr. Denecke): Mr. Lind, see if you can mark on that with a pen there how much that you took out.

A. I think it would come out about like that

(Testimony of Hilding F. Lind.)

(drawing on photograph). This, in fact, is finished road down here, so your deal would be down like that about 20 feet. Well, as you can see here, this tree is this same tree after the shot. This is the top of it right here, and the top of this tree that you see here is this tree sitting over here. This broke back. According to the Bureau of Engineers, we took out about 12,000 more yards, more material in back out of this than was originally designed to come out, yet, at no time—our shots were all examined by the government—we did not shoot any dynamite shots beyond the toe of our slope. This all up here came of its own free will. You can see these enormous boulders here. There is a man on them. That thing is probably almost 75 to 100 feet square and 30 to 40 feet deep. That in itself [23] come from clear up here in the mountain.

The Court: How far away from the place where you did the shooting?

The Witness: Well, it is above the shooting. We took the bottom out. We were attempting to take the bottom out, and then, as you can see, all of this rock up here came down. The two pictures are taken pretty much from the same angle. These are big boulders laying up in here.

The Court: You did not intend that the boulders would come down at all?

The Witness: Neither did the government engineers. This is staked only to come to here (indicating), and this slab to come off, but when there is a fault in here—the picture of that fault was

(Testimony of Hilding F. Lind.)

taken previous to the shooting, not that we knew it was going to bust that far, but we took the picture of that fault so we could show the Army Engineers. This is the rock in question here, and there is that small seam that ran under here. Now, we were asked to take it down like that (indicating). That is the way it was staked, but when we shook this a little bit, this whole mass came down. It was not anticipated, no.

Mr. Powers: Which item of damage are you referring to?

The Witness: August 24th.

Mr. Gearin: Station 714, August 24th.

The Court: Did you blast again on the following day, or is [24] that just how you broke up your time on the 25th?

The Witness: The 25th, those big rocks that came down there are—of course, it was too large to ever—not having previously been drilled, of course, you have to drill them. In other words, we have to split them so you can get them small enough so you can handle them, and we shot this small enough so that we could handle them, and these are repairs taking over a period of two or three days. When you fix the railroad track, the next day even after the train has gone over it, there is a settlement, and they pick it up again and reballast it, and that might go on, depending upon the weather or the conditions, for three or four, five days. That is why your expenses would be over four or five or even a week. I think the railroad

(Testimony of Hilding F. Lind.)

company knows in some cases even as long as a month after damage to a track in a certain section it was necessary to go back and reballast or take up and get the sags out of the track, although there may not have been any way——

Mr. Denecke: Your Honor, I know that the question of the amount of damage is not involved, but I think it is in order to state that the damages asked for here are not the entire damages by any means that were caused by this particular blast here, only what we estimated was caused by the overbreak.

The Witness: This station at 620——

Q. (By Mr. Denecke): This is August 27th you are speaking of now? A. Yes. [25]

Mr. Denecke: Would this be a good way to handle it, if he reads it, ask if there is anything that he has on it; is that agreeable, Mr. Gearin?

Mr. Gearin: Yes.

Mr. Powers: I do not see any point to arguing. Like he said, the Army Engineers felt the same way. It is mostly all in argument. I think he ought to testify as to his ability as to what happened without argument.

The Court: You cannot hold a man who is going to testify to this on all the correct legal requirements.

The Witness: Well, on August 27th, damages caused by a snag falling on the track. Well, at that point several times there were snags, and in that

(Testimony of Hilding F. Lind.)

vicinity up there, it was full of snags, and a snag fell on the track.

Mr. Gearin: That is at Station 620, Mr. Lind?

The Court: Will you tell us each time whether you made a personal investigation yourself and what was your conclusion?

The Witness: All right.

Mr. Denecke: May I add, Mr. Lind, if you want to here, we have—your diary, you have never found it and I have not, either, for 1947, but we have the time cards here. I do not think the Court wants to know what the foreman thought, but if there is any other information on here from which you can answer the questions, why, you just ask for it.

The Court: This August 5th, is that 1947? [26]

Mr. Denecke: These are all 1947, your Honor. Yes, your Honor, this all covers 1947.

The Court: He does not have his diary for this?

Mr. Denecke: I might ask Mr. Lind.

Q. Do you know where your diary is for 1947?

A. I take it it is in my——

The Court: He has not got it.

Mr. Denecke: He has not got it.

The Witness: Well, on this damage caused by a snag falling on the track, "This damage was caused by a snag falling on the track. This particular tree came from about a quarter of a mile above the right-of-way and was caused by drilling in the vicinity." I don't know, apparently at the time I made these investigations, I might say in 99 per cent of the time, in fact, I think almost a hundred

(Testimony of Hilding F. Lind.)

per cent of the time, I was on the job all the time, and whenever there was any railroad trouble or anybody working on the track, why, I usually was down there to see what caused it. I was really at all of this all of the time. I can honestly say that.

September 3, Station 665. I do remember that in particular because I can see there was an argument with the Bureau over not notifying them that we were going to shoot, but the shot was of such small consequence that we were shooting in places that appeared to be much more dangerous than that, and we had an awful big slide there, and it blocked the road for [27] two or three hours, and it was quite a mess, and we did some damage to the railroad track. I particularly remember that one.

Well, that is the same part of it.

Q. September 4th and September 5th?

A. We tore out some track there, and we were back in there reballasting and straightening the line which we would go back sometimes two or three days to do.

Q. All right. Now, September 8th, Mr. Lind.

Mr. Gearin: Just a minute, Mr. Denecke. On September 3rd and September 4th, 1947, that involved Station Number 665?

The Witness: And the fifth.

Mr. Gearin: And the fifth, September 3rd, 4th and 5th, at Station 665.

The Witness: We only had the one shot at 665, although we had quite a lot of trouble with that one shot.

(Testimony of Hilding F. Lind.)

At 699, I remember that one, apparently, because we had a lot of trouble there. We blanketed the track, and we shot and the rock broke very large, very big, and dropped directly on the track, not all of it, but there was some rock dropped on the track and broke rails, and these are just repairs. September 9th and 10th are repairs that happened on September 8th. This is at 669. That is a stretch of what we call talus, big boulders in it.

Mr. Powers: Is that 669?

The Witness: 669, on September 11th. That is a stretch [28] of over the railroad track. That is the talus. It is not a solid rock; it is with the big rock mixed in with it and the little rock so that it is more in a slide formation. Occasionally a big rock would roll down with small stuff and hit the track and damage the track. That was not caused from shooting or anything. That is caused from vibration, can be by rain, or it is a slide formation is what it is.

The Court: How many times did that happen on the job in the two years?

The Witness: You mean the rock?

The Court: Ravelling, an average?

The Witness: Oh, I would say on the average of 25 per cent of your damage is done that way or caused from—that is where there is single tracks and where there is a great area broke out, where one track would get broken, you would usually find 25 per cent of the damage was caused by just nat-

(Testimony of Hilding F. Lind.)

ural causes just like maybe the wind blowing, causing something to start.

Mr. Denecke: I think, Mr. Lind, what the Judge wants to know is how often does that ravelling start from shovels or other equipment being operated?

The Court: He answered the question. You cannot tell. Oftentimes it is brought on by natural causes. Sometimes it occurs when there has been shoveling?

The Witness: Right. [29]

The Court: Sometimes it occurs when there is blasting. Can you tell in advance whether rocks are going to ravel or not?

The Witness: No, you cannot.

Q. Did you get any advice from some of the powder companies as to how much powder you should use?

The Witness: Yes, sir, we always do on all our work. In fact, when we bid the job, why, they usually advise us as to how much rock is anticipated per yard, how much per pound, or what percentage of what pounds it would take, and they also give you their experience as to how to put your holes, and our powder company, the company we bought our powder from, was represented up there, I would say, 70 per cent of the time, with his experience.

The Court: Did he tell you that you could determine fairly accurately the amount of rock that would be moved by a certain quantity of powder?

The Witness: Yes.

(Testimony of Hilding F. Lind.)

The Court: Just the same, he made you sign the release sheet?

The Witness: What do you mean, release?

The Court: Before he gave you any advice, isn't it a fact that the powder company made you sign a release excusing him from all liability?

The Witness: Not in this particular case. [30]

The Court: What is the name of the powder company?

The Witness: Pacific Powder.

The Court: Do they not use a standard form of release?

The Witness: If there was, your Honor, I never seen it. At least, I didn't know anything about it.

The Court: I will venture to say they did, but go ahead. The Powder Institute requires that as a condition for giving advice. I will show you the form.

The Witness: They may, but I never seen it.

September 13th, 694.

Q. (By Mr. Denecke): In this particular one, Mr. Lind, you were shooting—if we are facing southeast with the railroad right-of-way on your right; is that not right? A. Yes.

Q. And you were shooting here on the left part of the old road, widening it into a hill on the left there, and do I understand that the shot, then, caused the rock to spread over the old road and off to the right and down onto the track there?

A. Sometimes, yes.

Q. In this particular case it did?

(Testimony of Hilding F. Lind.)

A. In this particular case, it did, yes.

The Court: Which one are you referring to?

The Witness: September 13th.

Mr. Denecke: September 13th.

The Witness: September 16th, that is the same as the 13th, [31] and September 17th.

Mr. Gearin: Is September 16th the same station?

Mr. Denecke: No, 669, Mr. Gearin.

The Witness: It is at Station 669, September 11th.

Mr. Gearin: I thought it was 699.

The Witness: That is 669. That is where that rock unravelled there awful bad.

The Court: There was an occurrence in between that at a different station.

Mr. Denecke: It is a different one.

The Witness: Yes, there was an occurrence between there. September 20th, 714, that is the one we showed the pictures of there, and that was just additional repairs after a train had gone over for a few days. We went back and straightened up the line, reballasted it, and we did some overhanging. When this overbreak happened, why, we had to go back and smooth off the slope again, and some more rock came down. On September 24th, Stations 680 to 683, that is where they put in a viaduct there, and the material there was very clayey with occasional boulders in it. An occasional boulder would roll loose and roll down and hit the track.

Mr. Gearin: What is the station, 680 to 683?

The Witness: That is September 21st.

(Testimony of Hilding F. Lind.)

Mr. Gearin: May I ask, Mr. Lind, if you will help me out on these things, would you mind giving me the station and then [32] the date? I will be able to go down the line with you.

The Witness: All right.

Mr. Gearin: Thank you.

The Court: Mr. Powers, do you have a copy of the exhibit?

Mr. Powers: Yes, I have a copy of it, your Honor.

The Witness: September 22nd, that is a repair caused by a spot that showed on September 21, and September 23 and 24 is the same. September 25 is the same repair to this track in the same location caused from the shock of the shot of a week before.

October 1, this damage was caused by slide. I remember this one personally, too, because it happened, the reason I recall it so well, it happened to be where the footing of the viaduct went. There was a lot of question at the time we were putting a footing in as to whether that would hold the weight of a slide, and we were concerned at the time whether we were going to be able to get a footing in there. That is why I happen to know. It was just a slide, and the rock went down on the track.

The Court: Is it your belief that this slide would have occurred even if you had not done any work up there?

The Witness: No, I would not say it was that because we are bound to disturb the ground. May

(Testimony of Hilding F. Lind.)

have. I would not say it wouldn't, but it probably did not.

October 1, the damage was caused by another slide brought [33] about by a shovel in the same manner as Station 685.

The Court: I think, Mr. Denecke, you ought to point out those instances in which you believe Southern Pacific should pay you.

Mr. Denecke: I can do that.

The Court: Because it had nothing to do with the work. You do not have to do that right now, but as the witnesses testify, if there is an item which you believe is chargeable to Southern Pacific——

Mr. Gearin: Your Honor, in response to certain interrogatories, I have five items here. We have only passed one so far.

Mr. Denecke: Do you want to check those?

The Court: Which one is that?

Mr. Gearin: August 27th.

Mr. Denecke: August 27th.

Mr. Gearin: Station 620, a tree on the track which the witness has described as being caused by drilling in the vicinity.

The Court: What date was that?

Mr. Gearin: August 27th, Station 620. That is the first one which they contend we are responsible for.

The Court: Did you make a personal investigation of that, of 620?

The Witness: Yes.

(Testimony of Hilding F. Lind.)

Mr. Denecke: August 27th. [34]

The Witness: That is the first one, isn't it?

Mr. Denecke: No, August 27th.

The Witness: Oh, this one?

Mr. Gearin: This particular one.

The Witness: Yes, I was there then.

The Court: Of what did your investigation consist?

The Witness: Well, usually by going out there and finding out where the snag came from. In other words, that entire country up there is blown over with millions of snags, and they extended for a mile above the railroad track. We had a lot of them that go down from as much as a half a mile above us, and some of them ended up on the railroad track down below, and you would always look to see where they came from, and if there was no work in that vicinity, you always figure that they just—the wind blew them over, or something, which is always happening, occurring there.

The Court: Well, how did you know? In this particular instance you came to the conclusion it was caused by drilling in the vicinity.

The Witness: Yes, in this particular case, I did; that is right.

Mr. Denecke: Your Honor, do you want me to take the rest of those, and I can take them——

The Court: No, you do not have to take them, but as we come to a point, you call my attention to it. [35]

The Witness: Where was I at?

(Testimony of Hilding F. Lind.)

Mr. Gearin: October 1, Station 683, was the last.

The Witness: October 1, Station 714, was caused by a slide. I have not any recollection of that particular deal there at all, except I think that was caused by a slide. What constitutes a slide to me is something that is natural, the ground rolls.

Q. Looking at that, Mr. Lind, the slide there, apparently, in your judgment, was caused by a shovel; is that correct?

A. Yes, caused by a shovel in that particular case.

Mr. Gearin: That was the same as at Station 714, occurred from the same cause; is that correct, Mr. Lind?

The Witness: Yes.

The Court: Is that the next one?

Mr. Gearin: That is the last one on page six.

The Court: Is that the next one we have a claim that the Southern Pacific is liable for?

Mr. Gearin: No, we have not gotten to that yet. The next one they claim is that on the last that Mr. Lind has.

The Court: Go ahead.

The Witness: October 1, I guess that particular bill is for loading and hauling material where there had been a slide on the railroad track.

Mr. Denecke: In other words, your Honor, if I may explain, this is geared to a statement of [36] expenses.

The Witness: October 2, 708, this was caused by

(Testimony of Hilding F. Lind.)

rock rolling off the shovel and falling on the track. When we say rolling off the shovel, we mean that we pick up a rock, and you swing around to load it in the truck, and if it rolls off the teeth, and when we say rolling off the shovel, we mean it rolls off the bucket, and it is liable to fall into the truck, and it happens quite often he busts the truck, and it is just like—most of these big rocks were balanced on the end of your teeth as you load it, and if they fall off the shovel bucket, why, they do damage.

October 6th, Station 668, this damage was caused by a falling snag. This snag fell as a result of falling another tree next to it. In other words, when we fall, do clearing and falling timber, if you fall a tree, if one tree happens to hit another one, a snag, why, the snag may fall, probably will.

The Court: Did that?

The Witness: That in turn went down on the railroad track.

The Court: And damaged the railroad track?

The Witness: And damaged the railroad track. As they go endo, they will go down, hit the rail, tear out a place, is what happened.

October 8th, Station 635, at this time there was a great deal of blasting in this vicinity of these stations. Well, in that place at Station 633, there was an awful lot of rock moved. I said a hundred thousand yards of rock, which by the [37] plans you can total it, and that is probably what it totaled up, and although we had a little railroad damage

(Testimony of Hilding F. Lind.)

through there, occasionally a rock would roll down our roadbed, roll down and hit the railroad track, and that is what those were made up of.

Station 635, we did some blasting there, and we caused some damage.

Here is damage caused October 10th, Station 638, by a tree hitting a track and knocking it out of line.

Well, some of these trees that we felled would be up in the hill, and they would be, maybe, oh, as high as five, six, seven, maybe a thousand feet above the railroad, and when you fall one of them, if they would happen to roll longitudinal with the hill or vertical with the hill, they would just go endo until they stopped, hit either the road or the railroad track.

This October 11th, Station 682, this is the place where, that is with reference to damage that was done before, and it was resurfaced, and, as I recall, this Station 682, there was so much rock rolling down there occasionally that the track was relocated, was moved out a little ways to protect it a little more. The rocks occasionally rolled down.

October 14th, Station 682, that refers to the same places. I think we were moving track at that time, relocating railroad track. [38]

October 22, Station 640, large quantities of rock and other materials were blasted, and almost all of such materials went places other than the track.

Q. (By Mr. Denecke): Do you remember that particular occasion?

(Testimony of Hilding F. Lind.)

A. Yes, I do. That was part of that same location where I said there was approximately a hundred thousand yards moved. We would shoot there, and, as I say, our damage there was not too extensive, but occasionally a rock would, when you shoot, would hit the railroad track like it will where you are shooting that much track and go down and break the track or bust a tie or something.

Mr. Powers: Which one are you speaking of now?

The Witness: Station 640.

Mr. Denecke: October 22nd.

The Court: We will take our afternoon recess.

(Afternoon recess taken.)

HILDING A. LIND

recalled, testified as follows:

The Court: I suggested to Mr. Denecke that in view of the fact that this is not a hearing on damages, that he only talk about such additional occurrences as are illustrative of his four types of claims, and if he has sufficient now to illustrate each of the four types, that he confine his other interrogation to the claims against the Southern Pacific. Go ahead.

Mr. Denecke: Well, your Honor, I believe I have covered [39] the various classifications as far as claims against the Hartford are concerned.

The Court: Yes, I think so.

Q. (By Mr. Denecke): Mr. Lind, turning to

(Testimony of Hilding F. Lind.)

page 8, on October 7, would you read that? First read it to yourself to refresh your recollection.

(Witness peruses document.)

The Witness: Yes, I remember that very well.

Q. Mr. Lind, I hand you Exhibit 27 here only for purposes of refreshing your recollection.

Mr. Gearin: Does his memory need refreshing on this point?

Mr. Denecke: Well, I assumed it did.

The Witness: It did on that particular thing.

Mr. Denecke: 27, your Honor. Well, I will ask you, Mr. Lind, do you recall now this incident?

A. Yes, I remember very well.

Q. Would you state, then, what occurred?

A. Well, the train was coming out with the logs that particular night, and before the train comes down, why, the railroad inspector comes ahead of it with the speeder. He travels ahead of the train, probably a half a mile, and checks the track so that it is in good condition to go over. In this particular case, why, I don't recall just exactly the amount of cars, but there was three or four cars went off the track and into the Santiam River, and we were using the railroad [40] track as a detour at that time so we built a temporary detour in order to get the traffic through there, and Mr. Smith—I mean the conductor and some of the cars, three cars went in the river, and some logs, and they asked us to pull the logs up on a high spot of ground so they would not float out, and then later on in the next

(Testimony of Hilding F. Lind.)

two or three days—I don't remember just exactly the date—why, we helped them put the cars back on the track. We were naturally disturbed as to what caused the train to go off the track, and there was a rather—the inspectors looked at it, and the railroad crew, and I talked to a couple of railroad inspectors a few days after that that looked at it, and they told me——

Mr. Gearin: We object that, that is hearsay, your Honor, not being shown whether the inspectors had any authority to make the statements binding on a corporate defendant.

Q. (By Mr. Denecke): Do you remember who these people were, their names?

A. The inspectors, yes, John Clark was the inspector at the time.

Mr. Gearin: John Carr?

The Witness: Clark.

Q. (By Mr. Denecke): Was there anyone else employed by the Southern Pacific? You say inspectors. That is the reason I asked.

A. I think that the tool inspector, I can't think of his name [41] right now, I think he is sitting right there, too.

Q. I hand you Exhibit 27 and ask you if, reading that, you are able to recall?

A. Ray Ross, yes, Ross was there at the time, and John Clark and Mr. Smith came up there. I know he was in traffic investigating with the Southern Pacific. We were all down looking, try-

(Testimony of Hilding F. Lind.)

ing to find out why the train went over, and at that time they said that it was from——

Mr. Gearin: Same objection; same objection.

Q. (By Mr. Denecke): They made statements to you concerning the reason the train went over; is that right? A. That is right; they did.

Mr. Denecke: Is your Honor sustaining the objection?

The Witness: I can say that there was never any repair done on that track. The train was put up on the track. There was no change ever made in the track there at that point.

The Court: I was interrupted during the middle of his answer. You say you were using the track as a detour? Well, what do you mean?

The Witness: Well, this entire mile and a half of railroad track was used as a detour all the time.

The Court: A detour for the railroad track or for——

The Witness: For vehicles, for vehicular traffic, and we blanket between the rails.

The Court: You blanket between the rails? [42]

The Witness: Right.

The Court: Then there was vehicular traffic over this stretch of track?

The Witness: Right.

The Court: Prior to the time that you blanketed it, were there any blankets on that stretch of track?

The Witness: Before we blanketed it?

The Court: Yes.

The Witness: No, sir; there was not.

(Testimony of Hilding F. Lind.)

The Court: It was merely used as a——

The Witness: Detour.

The Court: By the Southern Pacific?

The Witness: No, by the public because, you see, we were constructing the new road, and the old road was—you couldn't get over the road, the old road. It was obliterated, so we used the Southern Pacific tracks as a detour. That was according to our contract, Judge. The Bureau had gotten permission to do that. That was part of the original contract, to maintain this detour.

The Court: Now I understand. And did you make an investigation or did you form an opinion as to what caused the cars to fall into the creek?

The Witness: Yes, sir.

The Court: First I think we ought to qualify the man to see if he is qualified to form an [43] opinion.

Q. (By Mr. Denecke): What experience have you had, Mr. Lind, in determining the cause of rail derailment?

A. I would say very little when it come to causing a train to go off a track.

I have had quite a bit of track experience. We put in an eleven-mile railroad for the Union Pacific in 1943 at Tacoma, Washington. I was the superintendent on that job, and we put in eleven miles of railroad, switches, and such as that.

The Court: Let him testify anyway. Go ahead. Objection overruled.

(Testimony of Hilding F. Lind.)

Q. (By Mr. Denecke): What was your opinion as to what caused the train to go off the track?

A. Well, it was everybody's opinion that there was nothing——

Q. How about yours?

A. Just mine, there was nothing wrong with the track. It had to be something else that was either rolled on the track, because there was nothing wrong with the track at the time the cars went off, but we did no work near the detour of the Southern Pacific Company repairing the tracks. After the cars were put on, they still continued to use it.

Q. Was there any obstacle on the track?

A. No, there was nothing on the track whatsoever.

Q. Do you have any further opinion, you personally, as to what caused the derailment, in view of what you stated?

A. Yes, I looked at the trucks that were in question, and they [44] were thin. They wore very thin and I think that is what caused it.

The Court: The trucks; are you thinking of the cars?

Q. (By Mr. Denecke): Trucks of what?

A. The trucks of the logging cars.

Q. The railroad cars?

A. The railroad cars. They are logging cars, is what they are. It is a set of wheels.

Q. And the work that was done at this time did not concern the repair of the track?

(Testimony of Hilding F. Lind.)

A. No, sir.

Q. That work was, consisted of——

A. Building a detour around that part of the train. Of course, most of the train still remained on the track, and we had traffic waiting, and we built a detour temporarily around this particular section where the railroad was blocked.

Q. A part of it, also, Mr. Lind, concerned pulling the train, the labor and the equipment to pull the train and the logs out of the river; is that correct?

A. Yes, they requested that we have them get the train out of the river, the cars out of the river.

Q. Mr. Lind, if you will turn to page 11 at the top, January 7, 8, 9, 10.

The Court: What date?

Mr. Denecke: January 7, 8, 9 and 10, your Honor. Would you [45] state there if you recall what occurred?

A. Well, we had a heavy rain. We had a very heavy rainfall, and the culvert underneath the track plugged up, caused by debris coming down from the mountains there, and plugged that culvert, and, consequently, the water had no way of getting out, and it went over the top of the track and washed out part of the railroad, the ballast from under the railroad.

The Court: Near what station did this occur?

The Witness: At that point on A-3, job A-3, and I would say it was about—it does not say. There is no station here, but Mayflower Creek was the——

(Testimony of Hilding F. Lind.)

Mr. Gearin: Mayflower Creek?

The Witness: Yes, that is on job A-3.

The Court: Is that near the center of the job, or——

The Witness: No, no, that job was only a mile long. I would say it is about 620 to 626 or something. It has been four years now, but I would say about 626, something like that, twenty-seven.

The Court: Go ahead, Mr. Denecke.

The Witness: Well, that took care of that pretty much. I haven't any more to say about that.

Mr. Denecke: Look at April 9, Station 699.

The Witness: April 9?

The Court: What page?

Mr. Denecke: It is page 14, your Honor. [46]

Mr. Gearin: Fourteen.

The Witness: What item there do you want?

Q. (By Mr. Denecke): Would you read that, Mr. Lind, and then state whatever else you have to add on that, if you have anything?

A. "On this particular date there was no work being done at this spot but a part of the outside edge of the road fell out onto the track. This was probably caused by a fault or crack in the earth and equipment passing over this section. This is illustrated on the attached diagram."

Yes, I definitely do remember that.

The road at that time was finished, what we say finished. It was finished to the point where there was no more shooting or anything going on, and there was a fault. That particular place overhangs

(Testimony of Hilding F. Lind.)

the railroad, if anything, just a little bit, and I would say, oh, I would say about fifteen hundred yards just fell out and fell onto the track, and we cleaned it off and fixed the track.

Q. At the particular time that it fell there was no work being done? Was there any equipment going over the road at that time?

A. Well, there was equipment occasionally going up and down, but, if I remember correctly, I think even traffic was going on up above at that time, ordinary private automobiles.

Q. Ordinary traffic?

A. As I recall it. [47]

Q. Mr. Lind, when the job was completed, which was in the spring of 1949, were you required to recondition the road? A. Yes.

Q. I am speaking of the railroad right-of-way now. A. Yes, we were.

The Court: I do not understand. Who required that?

Q. (By Mr. Denecke): Who required you?

A. In our original contract we have to leave the railroad track—we have to be released by the railroad that their track is in good condition, and in order to get a release from the Bureau of Public Roads we had to get a release from the railroad company, and the railroad company wanted these certain places, in fact, most of it, realigned a little bit, reballasted, in order to use it after we were gone, without any expense.

Q. Did you examine the portions of the road

(Testimony of Hilding F. Lind.)

that were reconditioned? A. Yes.

Q. In your opinion, Mr. Lind, was the work that was done by you required by the fact of ordinary wear and tear of the railroad, or was it required by the work and the damage that was caused by you people?

A. Oh, I would say that it was caused by the railroad because those tracks had planked on them, as you understand, and the traffic used it, the track, mostly automobile traffic. They [48] are not too hard on the railroad. It was all planked so that there was no maintenance, not normal maintenance carried on the railroad during the year and a half that it was in use.

Q. Maintenance by whom?

A. By the railroad company. There was no maintenance there at all. There had been—I understand there was a maintenance section crew there all that time.

Q. Do you know this of your own knowledge?

A. Yes, I know this of my own knowledge. They had a crew previous to the time of the contract that worked in this particular section of maintenance of the railroad, replacing ties and rails and ballast. In the year and a half that we used it as a detour, there was no maintenance on the railroad itself, so, consequently, when we were finished with our job, why, there were some low spots and ties to be replaced that were too old, rotten, and some reballasting to do that would be considered

(Testimony of Hilding F. Lind.)

normal wear and tear, or it would have been done previous if it had not been for the detour.

The Court: There is one other item that Mr. Gearin told us about that was not listed in this.

Mr. Gearin: He has covered it. He had it some place else, your Honor.

Mr. Denecke: It was, your Honor. It was not listed chronologically.

The Witness: Yes. [49]

Mr. Denecke: October 7, Sardine Creek.

That is all, your Honor.

The Court: Let Mr. Gearin examine about the Southern Pacific claim first.

Cross-Examination

By Mr. Gearin:

Q. Mr. Lind, going back in backward order taking first the reconditioning of the road bed, you were familiar with that contract, that is, the proposal and contract in this case, Project 24-A2?

A. Yes, yes.

Q. I will ask to hand you this document, the contract which has been marked Plaintiff's Exhibit No. 1, and refer you to the top of the paragraph referring to maintenance and restoration in particular with reference to the special detour.

A. That is right.

Q. Is it not a matter of fact then, Mr. Lind, that you were required to put the road bed back in the same situation, in the same condition that it was when you started the special detour?

(Testimony of Hilding F. Lind.)

A. I would say that it was supposed to have been as equally as good, but I think that in this particular case it was better.

Q. But you performed the work then because of this particular provision of the contract to which I call your attention? A. Right.

Q. Mr. Lind, did I understand your own testimony to be that the [50] type of work that was done would nearly have to be done by the railroad anyway after the expiration of a certain period of time? Was it normal maintenance or what?

A. Well, I would think—yes, it was normal maintenance in almost all cases. There were some cases there where—we didn't list them though in the bill to the Southern Pacific. I worked on this bill myself, and any work done where there was any damage or where anything on the track we didn't bill that all against the railroad. We did bill anything that we thought where there was a relining or reballasting that was beyond the scope of our contract.

Q. Who asked you to do that or directed you to do it?

A. Through the Bureau of Public Roads and the Southern Pacific.

Q. Did you say that any of this where this detour was put in, any of that had been rebuilt because of rocks landing or trees landing on it?

A. We did not include that in the bill to you people. That had nothing to do with it.

Q. Well then, when you had planking on there

(Testimony of Hilding F. Lind.)

that you have described that you had had, this is just a portion then of your work that you had to do on the over-all tracks?

A. Right; this is just a portion.

Q. There were lots of sections where you had to reballast and reballast even two or three times where damage had been done to the track? [51]

A. That is right.

Q. Over this detour you would have these heavy pieces of equipment, Caterpillars, Tournapulls, and all that big——

A. We never did use that detour for our own equipment more than vehicular rubber tires.

(Thereupon, there was discusison off the record between court and counsel.)

Q. (By Mr. Gearin): To sum that up, the items of April and May, 1949, reconditioning of the road bed, that work was required by Bureau of Public Roads and the Southern Pacific Company? A. Correct.

Q. In some instances you think you put it back into a little better condition than it was before?

A. Yes, sir; I think we did.

Q. Going back to the—I am going backwards you will understand. I will give you the reference to the page. A. Yes.

Q. On the item of April 9, Station 699.

A. What page is that?

Q. That is page 14? A. Yes.

Q. Now, referring to that item, you say that that

(Testimony of Hilding F. Lind.)

was probably caused by a fault or crack in the earth and equipment passing over this section?

A. Correct. [52]

Q. That would be Kuckenberg heavy equipment, wouldn't it?

A. Not necessarily. As I recall, in April—in fact, I am quite sure of this—in April all traffic, vehicular traffic, was no longer on the railroad track down below. It was all up above, and they were all using the highway.

Q. Well, now, referring to that diagram, you have a portion marked "B." That was new work in through there; was it not?

A. Everything above that new road was new work, excepting the old road was there. It was just dangerous.

Q. There had been blasting all in through there?

A. Correct.

Q. Now, referring to the incident of January 7, 8, 8, and 10 on Mayflower Creek—let us see what page you have that on.

The Court: Ten.

Q. (By Mr. Gearin): Page 10 at Mayflower; is it not? A. Yes.

Q. You said that the debris blocked up a culvert? A. Yes.

Q. What kind of debris was that? Was that the debris from your operations up on the hillside, bits of bark, bits of trees, or——

A. No, I don't think it was as much bark as it was possibly some dirt and loose soil, dirt, and

(Testimony of Hilding F. Lind.)

it was just a high flood. We had a terrific flood at that time up there. We had all our creeks running high. That is a normal thing that happens, I [53] know, on roads.

Q. Well, you and I are talking about the same thing; are we not? A. That is right.

Q. On this debris that blocked up the culvert, had there been operations on the uphill side of that?

A. Quite a ways from there. I would say the center line of your highway is probably five or six hundred feet from there.

Q. Was not some of the debris caused by the activities of Kuckenberg somewhere along the line up the hill?

A. Well, the debris, not so much, not debris because it is just a fill that is in there, rock and dirt, you understand. Between the new highway the railroad there is timber; there is brush, and things like that.

Q. You had been up there clearing off the timber and the brush and making changes?

A. Not between the highway and Mayflower Creek, no, but between—up above there is a space between the two there.

Q. Is that where the slide was in there?

A. Yes, it—well, it wasn't so much of a slide. What we had was just a devil of a lot of water, awful high water, and the culvert down below is small.

Q. Refer to page 10, just about one-third of the way down, if you will, Mr. Lind.

(Testimony of Hilding F. Lind.)

A. Yes. [54]

Q. Where it says, "January 8, Mayflower. The first part of January, this area had its heaviest rainfall in years. This caused the surface to be very fluid. Tractors and other heavy equipment moving over and near this surface caused a slide which caused this damage."

You are referring to tractors and heavy equipment of Kuckenberg?

A. Yes, well, we worked up there at the same time, and also vehicular traffic up there.

Q. Now, then, we get moving back up a bit to Sardine Creek, train derailment. A. Yes.

Q. At that time immediately afterwards the Southern Pacific Company claimed that the track was in bad condition, didn't it?

A. Well, I don't really know. I suppose they did, but I heard that several times.

Q. Do you have any memory of that now?

A. Of the——

Q. Let us look at page 8. I know this is some time ago, Mr. Lind, where it says, "October 7. Train derailment, Sardine Creek. A car of an S.P. train was derailed."

A. There was more than the one car.

Q. Then this statement, then, is incorrect for that particular——

A. Well, that particular one, I don't know whether it is a [55] typographical error or not. I don't know, but I know there was more than one car in there because we helped to pull them out.

(Testimony of Hilding F. Lind.)

Q. Then the very next sentence: "S. P. claims because the track was in bad condition due to Kuckenberg's operation."

A. Well, that was after the wreck, yes.

Q. Right after the wreck?

A. No, not right after the wreck. This was quite awhile after the wreck because at the time of the wreck there was no such—we never did work on that track from that time on. They logged over that for months after that, and no work was ever done on it.

Q. They had no more derailments?

A. They had no more derailments.

Q. Would there be any debris, rocks, boulders, sticks, or anything like that along where the public would traverse during the, or covering the area where you had this temporary detour?

A. Well, as I explained, that speeder goes down ahead of the logging cars.

Q. Do you know whether or not the speeder went down the night before this happened?

A. Yes, I happen to know a speeder went ahead of the car that day. In fact, I talked to Clark.

Q. Well, then, the speeder goes down for the purpose to see that this area is clear? [56]

A. Yes.

Q. Because something gets on the track. Now, will you agree with me that there is a definite possibility of a rock or boulder getting on the track after the speeder had gone by?

A. Yes, I suppose there is a possibility.

(Testimony of Hilding F. Lind.)

Q. Do you know whether a small boulder or rock itself caused the derailment of the train?

A. I couldn't say that.

Q. Do you know whether any of the planks could have commenced to become disarranged because of the vehicular traffic?

A. Well, we looked at the track after the train went over. We looked at it, and there was no loose planks there.

Q. On the detour, did any heavy equipment also operate over there?

A. Oh, yes, there was times we ran them up there, but not very often. Our Cats would not go up very often, but occasionally one would go up, yes. In fact, when we had big boulders and stuff right down from the hillsides, we would have to have something down there to push them off.

Q. And the area where they had the derailment there, there had on occasions been rocks and boulders down in the same area, come down at periods?

A. Yes, there may have been a very few occasions, but we had very little expense or trouble there.

Q. You had some? [57]

A. Well, when I would say some, I do not think we had ever replaced rail in there. If we did it was without my knowledge. It happened to be there was very little damage done to the track. It was in a clay condition there same as other places.

Q. Mr. Lind, in your operations there would

(Testimony of Hilding F. Lind.)

you say that at times the Kuckenberg operations would anticipate that rocks and debris would be dumped on the track?

A. Well, yes, we anticipated, but we never billed for anything that we anticipated, that is, on the Southern Pacific people.

Mr. Denecke: Are you speaking of this particular spot where that train was derailed?

Mr. Gearin: I am speaking of generally.

Mr. Denecke: Generally.

The Witness: Generally, no, we under-anticipated what we would call operational expenses. In other words, any time that you are working close to a building or railroad or in town, why, you anticipate a certain amount of expense such as flagging or protecting property or delay in time, so we anticipated a certain amount of work to be done on the track above other sections, but none of that to my knowledge—and I worked on these bills personally—did I ever put in bills against anything that I didn't think was not beyond the scope of what we originally planned. In other words, in this breaking and cutting back to this October 7 derailment, we at that time certainly had had no idea that the train was going over [58] the Sardine Creek when we bid the job.

Q. Perhaps you and I are talking about different things, but the question I wanted you to answer, Mr. Lind, was this:

At the time you would start your operations, you anticipated that there would be some physical dam-

(Testimony of Hilding F. Lind.)

age done to the track, ballast, road bed, ties of the Southern Pacific, didn't you? A. Yes, sir.

Q. And you repaired that work? A. Yes.

Q. Were there any items when Southern Pacific ever repaired that or did any work around their own tracks or road bed or ties or ballast at any time?

A. No, there was no—there was a time or two when I called them up there when we needed some help, if that is what you mean.

Q. Well, you will——

A. Well, if you mean there was a steady maintenance gang, no, there was not.

Q. There were times when Southern Pacific Company had a jeep come to help clear the track, right?

A. Yes, when we called them, only on call.

Q. Then they repaired the track?

A. Yes, we helped them repair the track in every case. They usually always had an inspector there. We furnished the men. [59] There were several cases, two or three that I know of.

Mr. Gearin: Will you excuse me a moment, your Honor. I want to confer with our engineer.

(Discussion off the record.)

Mr. Gearin: I have nothing further at this time, your Honor.

(Testimony of Hilding F. Lind.)

Cross-Examination

By Mr. Powers:

Q. Just a few questions, now, Mr. Lind, to summarize this job. As I understand it, you went down to make a survey before you bid on the job?

A. Correct.

Q. How much time did you spend down making your survey?

A. Well, I did it at two different times.

Q. Add them together.

A. When we had the State job, which was just below, we had a contract on the lower end, and I worked there a year at that time and I occasionally—I went up there probably for almost a week, and then we got a job over in Eastern Oregon, and I knew these jobs were in the offing, as you might say. They were set up for February to next spring, and we finished there in October, so I went up there about every day for almost a week, and then when I got the profile, the jobs actually came up, and we went up to right at the Mayflower job, and I was there almost a week, I would say, about ten days all told. [60]

Q. Do you call this Mayflower job——

A. I mean Santiam.

Q. Santiam, yes, I just wanted to call it correctly. A. That is right.

Q. As I understand it, you are very well acquainted in that territory anyhow; are you not?

A. Quite well, yes.

(Testimony of Hilding F. Lind.)

Q. You knew the nature of the terrain and the nature of the work you were going to do; is that correct? A. Yes, I think so.

Q. Pardon? A. Yes.

Q. And the work itself, I believe you said, required you to do two or three different things. One was to clear up—you had to do clearing; did you not? A. Yes.

Q. Did that include the snags and that sort of thing within the area that you have described?

A. Within the right-of-way area, yes.

Q. So you would have men cut them, blowing them out or cut them out of there; is that correct?

A. Yes.

Q. Then you had also to remove lots of rock, gravel, things of that sort? A. Yes. [61]

Q. As I read the contract—you have just said you are familiar with it—you were required, and as a part of your bid, to make this detour and maintain it for the use of the public; were you not? A. Yes.

Q. You had your prices in there for planking this thing, what kind of planking you will use; you had to have flagmen; you had to conduct one-way traffic through there, and that was your responsibility, then; was it not? A. Yes.

Q. You were actually operating that detour, and the detour, as I understand it, was a distance of about a mile and a half?

A. Approximately.

Q. The railroad would go through, the tracks

(Testimony of Hilding F. Lind.)

were there, and the motoring public or anybody going along there would go through, and you would tell them when they could go and so on.

It is also a fact, or is it not a fact, I don't know—I will try to go back—the different types of damage that—or causes of damage that you talked about, Mr. Lind, is from snags, one or two I think you got down. I do not think there was over one or two, was there?

A. Well, possibly a few more than that. Probably not.

Q. Well, there would be snags and then there would be rocks and gravel; that would be it, wouldn't it? Was there anything else coming down there to cause any damage, if you know, in your whole list? I am just trying to summarize it, cut it [62] down, summarize what I understand.

A. No, that was mostly it, snags, rocks and boulders.

Q. Now, then, as far as snags were concerned, you knew that condition, knew they slide down there even if nobody was around there, sometimes, you said; isn't that right? A. Yes.

Q. It was your job on the contract to keep them off there, off of that track; was it not?

A. Not necessarily because——

Q. Well, let me interrupt, then, and then I would like to have you finish. A. Yes.

Q. It would be your job to keep them off of the detour? I will put it that way. A. Yes.

Q. Then other places it would not be; is that

(Testimony of Hilding F. Lind.)

right, unless you were responsible for getting done there? That is probably correct, is it?

A. That is right.

Q. Then the same thing would be true with respect to rocks, then; you had the responsibility for that detour, it was to keep that clean and use it?

A. That is right.

Q. No matter where it came from and how it got there, that was your responsibility under the contract, wasn't it? [63] A. Yes.

Q. Now, one cause of the rocks getting down, or I remember three causes, one, sometimes you would blast and they would happen to get over on the track one way or the other; that is correct, isn't it? A. Yes.

Q. Is that correct? A. Yes.

Q. And another time, or the times they would drop out of the shovel or fall after they would get out of the teeth, and that would happen, and you expect a little of that, don't you?

A. Yes, normally.

Q. Yes, it is normal operation? A. Yes.

Q. Then the other time would be, then, ravelling or unravelling of the rock, and I think you figured that there was about 25 per cent of that might be due to unravelling rock. Well, in working in that kind of a territory, do you always have unravelling rock? Are you accustomed to that?

A. Not so much as there.

Q. But you are used to it?

A. You will have a certain amount.

(Testimony of Hilding F. Lind.)

Q. You figure that in your contract you have to take that into consideration, don't you?

A. That cleaning off, of course, we never billed—— [64]

Q. Excuse me now. I will ask you for a direct answer. Please tell me whether you figured that in your contract.

Mr. Denecke: If you know.

The Witness: Well, I do not know for sure.

Q. (By Mr. Powers): Let us refer to the contract, then. You expected trouble when you got up there from material running down on the track and doing damage, didn't you, when you bid on the contract? A. Doing the damage, no.

Q. You had a contract, I imagine, didn't you?

A. Yes.

Q. I will call your attention to this portion on page D-6 between Stations 691 plus 85 and 714 plus 50, Unit B, "The roadway excavation involved is in such close proximity to the railway company tracks that some interference with the continuous operation of the railroad and possible damage to its facilities would seem to be unavoidable."

Now, you had this contract before you when you figured those prices, didn't you?

A. Yes, but most of that—that is not damage. In other words, we did not anticipate the damage. That is why we blanket it and cover it.

Q. "At this or any other points where similar conditions exist, the contractor shall keep the engineer and the railway company fully informed

(Testimony of Hilding F. Lind.)

in advance of his plans and shall cooperate in [65] their modification and execution to the end that such unavoidable interference and/or damage may be held to a minimum. Railroad operation shall be restored at the earliest practicable moment either by temporary shoofly construction or by restoration of the now existing condition. Any damages or costs involved which result from such construction operations shall be at the expense and responsibility of the contractor."

Is it not a fact that when you bid on this contract that you knew or estimated the damage that you would have along there?

A. No, we never put anything in for damage on the railroad track.

Q. I will ask you, now you testified here in the beginning, Mr. Lind, that this extra amount—you got two different rates there on this unit that we are talking about? A. Yes.

Q. One was $1.02 per cubic yard, is that right?

A. Correct.

Q. And the other was $2.00 a cubic yard, practically twice as much; was it not? A. Yes.

Q. As I understand your explanation of that is that you had to have that extra money in order to take care of building up the railroad or protecting the railroad with planking or something; is that right? [66]

A. Well, no, all of the entire mile and a half of the detour is—although the detour was a mile

(Testimony of Hilding F. Lind.)

and a half long, the detour was put in with this class D excavation. In other words, we put in the timber when we put in our price, when we arrived at our unit price. The lower end of the job, as I explained to start with, is pretty much dirt, and the upper end is quite a lot of dirt, and most of the rock on the job is in the center of the job, the biggest portion which was over the railroad track. That is one reason for the additional money, is the fact that there is so much more rock to shoot there. The first mile we had very little rock, and the last half mile we did not have as much rock.

Q. It was to take care of that extra?

A. It was to take care of the extra mile and a half detour.

Q. It was to take care of the extra cost; was it not?

A. In maintaining the traffic, because our traffic and the railroad being underneath, it was automobile traffic going through every thirty minutes, and then the traffic was going underneath and you couldn't work because it was too dangerous, and that is why we had the cost.

Q. Well, you actually were putting that unit price in in order to take care of damage; were you not? A. Not damage. We didn't——

Q. You are figuring——

A. We didn't figure on damage; we figured on the percentage [67] of time worked.

Q. Let me call your attention now to the contract which you were figuring on. A. Yes.

(Testimony of Hilding F. Lind.)

Q. I am reading from page D-9, 24-3.10 and 24-5.1 and the schedule of your bid in back under 24(5), under those two provisions, I will put it that way, is where you would make your charge of $2.00 a yard. Now, that correctly relates to the matter of damage?

A. Damage caused occupationally, yes, but not accidentally. In other words, if I might explain something.

Q. Yes.

A. We will take, for instance, that we are shooting, we will say, at Station 714, and we know, we do know that there is going to be some rock going down there on the railroad track, so we go in there and we plank that track and we put in four feet of dirt, haul four feet of dirt on top of it. Then we go ahead and we shoot. Well, we will say that two hundred yards falls on that track. We have to remove that rock. The expense, in the first place, of protecting the track is in our bid, also the expense of moving this ten or twelve yards off of the track that falls in there, is our expense, and the removing of this protection, but not the damage because there is damage that was anticipated because we covered it.

Q. Do you mean to say, Mr. Lind, that you did not anticipate [68] any damage to that railroad track?

A. We only—we did charge damages to tracks before we put on a hundred thousand yards or something like that.

(Testimony of Hilding F. Lind.)

Q. Excuse me, but let me ask you this question. As an engineer, and in the nature of that terrain and that job, did you think that there would be no damage on that track from your blasting?

A. A very small part of it if we protected it. We did not have it in our bid.

Q. Did you or did you not expect damage to that track in the work you were going to do?

A. Maintenance on the detour, from the detour.

Q. Just answer correctly, yes or no, if you will. Then you can explain anything you want to.

A. Yes, I imagine we did expect some, very little, very little.

Q. Why, of course, you did, and you put in this bid for $2.00 per cubic yard?

A. That was not for any damage because I helped make out the bid, and I know we did not have it there.

Q. What did you think this meant, that this contract would be performed by methods which will result in the least possible damage to the adjacent railroad and to the existing road? Didn't you think—didn't that mean there was going to be some damage?

A. Well, if I could go on—that is true in every job we do [69] in construction work. I think you are familiar enough to know that, too, and that is when you take a job here in the city, the streets of Portland, you realize that you may do some damage to some adjacent building or something, and you take insurance for that matter, but you

(Testimony of Hilding F. Lind.)

do not put in an additional. You figure it as hazardous and you may have to carry on hand some timber or something to protect the windows that you possibly—but you bill the insurance company for it later.

In every job you anticipate a certain amount of damage in the construction work.

Q. Well, now, the very basis of the contract, the basis demanded under this provision we are talking about, provides you shall figure for the damage.

A. Every job is that way. I never seen a job——

Q. Just a minute, every job is not that way, if you will excuse me.

A. Take any of these other contracts, I think you will find the same thing in some of these other contracts.

Q. Here you have got a governmental contract that is asking you, or telling every contractor that works on that job, first that it is unavoidable to have damage to the railroad track?

A. Yes, they think it is unavoidable.

Q. Well, they tell you that.

A. Yes, but I have my own opinion as to what is unavoidable or is not. [70]

The Court: I do not think we are getting any place.

Mr. Powers: I want to get down to this.

Q. Now, after that, then, you are asked to—you are required to repair any damage that occurs?

A. That's right.

Q. When you are doing that work?

(Testimony of Hilding F. Lind.)

A. That is right.

Q. When you blast and do the work in close proximity to the track? A. Yes.

Q. Now, your testimony is that that has been, that this occurred when you worked in close proximity to the track; is that true?

A. In most cases, yes.

Q. Then it tells you in the Basis of Payment, which is the way you figure out the bid, that you shall add to your unit price such amount for full compensation for all the special work necessary in blasting and excavation of material to prevent what, to prevent damage to the railroad and any work necessary in removing debris unavoidably dropped on the roadbeds of the railroad and existing highway and for the correction of any damages to those facilities or to the telephone and telegraph lines.

Now, there is the very basis that you were putting your bid in, and you put your bid in on the basis of $2.00 instead of $1.02? [71]

A. No, that is not the reason at all.

Q. I am reading from the contract. It says "Basis of Payment." They are asking you to make a bid on the basis, then, to put your bid in at $2.00?

A. Yes.

Q. After reading this, and they are telling you what to do; is that true?

A. Well, every contract is the same. You are liable with any job; that is correct.

Q. I won't argue about it.

(Testimony of Hilding F. Lind.)

A. They call your attention to a dozen things on jobs. You do not necessarily bid them.

The Court: I understand in answering a statement by Mr. Denecke you indicated that about one-third of the job is a straight and regular job?

The Witness: Almost two-thirds.

The Court: That was one-third of the mile that was not near the S. P. lines, and I think you were building new roads there; is that right?

The Witness: Your Honor, there is almost—I would say there is, yes, it is just about a little over a third, probably, would be ordinary construction.

The Court: What was the unit price on that portion of the job, or was that figured that way?

The witness: Yes, it was. There is two—— [72]

Mr. Denecke: The prices for the bid are in this contract, your Honor. Can he refer to this?

The Court: Yes, certainly, go ahead.

The Witness: It is $1.02 for A excavation, and I think $2.00 for B, isn't it?

Mr. Denecke: I do not know.

The Court: One price is $1.02½.

The Witness: $1.02, yes, two cents, that is for the one section, and $2.00 for the other section.

The Court: One section is $1.02, and the other two sections are $2.00?

The Witness: No, there is just the two sections. There is what they call A and B classification, but some of those—there is one thing that probably the insurance company does not know, that I would

(Testimony of Hilding F. Lind.)

say fifty per cent, or almost fifty per cent, of our bill is on the straight $1.02 material.

The Court: The class B job work includes the work done where the old road was relocated and the detour constructed?

The Witness: It is on the railroad track below, yes.

The Court: What is the last third?

The Witness: Well, the last third, that is——

The Court: Where you came off the S. P. lines and off the highway?

The Witness: S. P. lines off the highway, yes.

The Court: And on those two classifications you charged [73] $2.00?

The Witness: Just charged the $2.00. It goes by stations, your Honor, starting at Station 700 to Station 683, which is only two thousand feet, we got $2.00 a yard. Everything else was $1.02.

The Court: Did you not use the pilot cars throughout for the mile and a half?

The Witness: Yes, sir.

The Court: On page 14 of the exhibit to which you have been referring you talk about one Station 700.

The Witness: Yes.

The Court: In that discussion you called attention to the fact that this additional or the additional charge resulted from the fact that you could only work your men about half the time?

The Witness: That is right.

(Testimony of Hilding F. Lind.)

The Court: During the eight-hour shift they only worked about four hours?

The Witness: Correct.

The Court: And also the pilot car?

The Witness: Cost of the pilot, yes.

The Court: Did you not have that same cost on work done under classification A?

The Witness: No, we did not, not in all of it, your Honor. We had no pilot car there at all, no detour. [74]

The Court: In other words, you built the road in sections? You would finish section A which——

The Witness: No, our pilot car——

The Court: Or between certain stations?

The Witness: No, but you see, the entire length of the job actually, I think, was four and a half miles, but the detour only covered a mile and a half or a little less. The detour didn't run—we didn't run a pilot the full four miles.

The Court: Under the contract in question here, you had two classifications for the mile and a half, A and B; isn't that right?

The Witness: A includes also both ends, included all of the job excepting two thousand feet, approximately. This B only covered the two thousand feet or so where we go the additional money.

The Court: Two thousand feet out of a total of approximately six thousand feet, or it is a mile and a half, about seventy-five hundred feet?

The Witness: Yes.

(Testimony of Hilding F. Lind.)

The Court: And the rest of the three miles was done on a different contract?

The Witness: No, it was the same contract. It is all the same contract. There is actually four miles of road, and there was, you might say, three and a half miles, better than that, three and a half miles of that was in this $1.02 rock, there [75] is only about two thousand feet of it that is in the $2.00 rock, and a lot of these expenses that we have spent in here are not in that area where that $2.00 rock is, your Honor. It is in accidents that happened on the other sections, as a result, you see what I mean?

The Court: Under the A job?

The Witness: Under the A job, although we didn't get any additional money for it.

The Court: The difference between the $1.02 and the $2.00 you say is in the cost of the pilot car and the fact that you could only work your men about half time?

The Witness: That particular section there for the two thousand feet you could not work at all when traffic was underneath you. You couldn't work at all.

The Court: And also the fact that——

The Witness: But in the other sections they could.

The Court: ——if you were working with rock it was more expensive?

The Witness: That was the hardest rock we had. In fact, that is on the basis of the damage right there at that particular point. It is the hardest rock in the job. That is where the cost came in.

(Testimony of Hilding F. Lind.)

The Court: You only anticipated that you would have to spend money to cover over the line, but you did not anticipate that any damage would result from the fact that there was a [76] fault or a seam and the amount of the rock that fell from the shot would greatly exceed your anticipated figure?

The Witness: That is right. Most of these jobs, in the first place, the way I look at them, when we bid them, that is the reason we carry insurance is we do know that accidents will happen on the job. We do not anticipate each. We anticipated a great expense in running the detour, a great expense due to the fact that there would be so much delay in shots. We could shoot small shots, a lot of holes, without any great quantity of rock, hold down on our powder, and that is where we anticipated the expense, but we did not anticipate that if we spent this money that we would have a lot more damage over and above any other charge, although we do recognize the fact that occasionally there is damage because that is why we carry insurance as we do on all the jobs. We anticipate a certain amount of damage, but we feel our insurance covers that.

The Court: Go ahead.

Q. (By Mr. Powers): Well, now, I made a summary. You say about half of this is on A as distinguished from unit B. Unit B is where you charged $2.00 a yard?

A. Yes, I was guessing when I said——

Q. Yes, and quite a loose guess, was it not?

(Testimony of Hilding F. Lind.)

A. No, I don't think I could be off too terrific.

Q. Well, I have it down to the first $28,000 that you have presented and actually it figures out under A that $4300 was [77] asked.

A. What stations do you go from?

Q. I go from the first $28,000 list of stuff you put in.

A. By the stations, what stations do you start?

Q. Well, we start here at 685. That is where it starts. You have the contract before you.

The Court: Well, I do not think that means anything, Mr. Powers.

Mr. Powers: That is right.

The Court: Another bill may have it all at $1.02½, and the third bill may have $2.00. It all depends on the stations you have.

Mr. Powers: We have taken only on our $2.00 per cubic yard we have previously made——

The Witness: It starts on 683 and goes to 714, doesn't it?

Q. I believe so.

A. So it is only—well, now, let's see. I do not find your 24-2.

Q. Let's see. I have it marked here. Here it is. This does not refer only to unit D but refers to where you got blasting.

A. Yes, well, that isn't anything—I would not want to say until I get to it, but I know that a great deal—in fact, I am very much surprised that there is not much more than that, but I do know a great

(Testimony of Hilding F. Lind.)

deal of this is on the $1.02 which we consider a normal job. [78]

Q. You did blasting on that, too, didn't you?

A. Oh, yes, same type of work.

Q. Yes, up above the railroad track, too?

A. Yes, the conditions were pretty much the same. The only thing was that in some cases that rock was not as hard there as it was over this particular spot. That is why we didn't get the money for it that we thought we would have to get for the other.

The Court: Are you almost through, Mr. Powers? Is Mr. Lind coming back tomorrow?

Mr. Denecke: He does not want to, your Honor, but it seems to me pretty much necessary that he be. I would like to have him here when some of these other witnesses testify.

The Court: We will recess until nine-thirty tomorrow morning.

(Thereupon, the trial of the above-entitled cause was recessed to June 2, 1953, at 9:30 a.m.) [79]

June 2, 1953

Additional Appearance:

ROBERT T. MAUTZ,
Of Attorneys for Plaintiffs.

Morning Session

(June 2, 1953, at 9:30 a.m., trial resumed pursuant to recess duly had.)

HILDING A. LIND

recalled, testified as follows:

Cross-Examination

By Mr. Powers:

Q. Mr. Lind, there was a very steep slope along this place, especially where you were using the track for detour; was there not? A. Yes, there was.

Q. On that slope was there loose rock, things of that sort, before you started to work?

A. There was some, yes.

Q. Did your contract include clearing that and keeping it clear from the track when it rolled down?

A. Yes.

Q. That was part of your work when something rolled down, that was included, anyway that was included in your contract. We have some photographs that are marked, your Honor.

I will hand you Defendants' Exhibit 114 for identification. Can you identify that, please?

A. Yes, it looks like at Station about 700-685.

Q. Is that a fair representation?

A. Well, this is a ravelley type of rock that I mentioned. This [80] isn't the—that is some of that ravelley rock.

Q. Ravelling and loose rock on there. The hard rock is the other——

(Testimony of Hilding F. Lind.)

A. Yes, this was not solid rock, you see.

Mr. Powers: We will offer it in evidence.

Mr. Gearin: We have no objection.

Mr. Gearin: No objection.

The Court: It is admitted.

(Photograph previously marked Defendant's Exhibit 114 for identification was received in evidence.)

Q. (By Mr. Powers): I hand you Defendant's Exhibit 115 for identification. Can you identify that?

A. This, I think, starts about 675 and goes to—it is looking upstream and probably was about 650 or 655.

Q. Is this part of the detour that you are talking about?

A. This is part of the detour, but we had very little trouble in this section.

Q. But it is part of the detour? A. Yes.

Q. One hundred twelve, that is some more of it?

A. Yes, this is the trestle.

Q. Where is that located?

A. 675, Sardine Creek.

Q. That is Sardine Creek? [81]

A. That is where the train went over.

Q. And 113, that shows some more of the track, does it?

A. Yes, but this is way up east. There is no trouble here at all. That is a fill.

Q. This was no part of the detour?

(Testimony of Hilding F. Lind.)

A. Yes, that is part of the detour, but this is all fill. This is not the cut, so there is no trouble here at all.

Q. What is this rock down here (indicating)?

A. Well, this is from the fall. This comes up in layers, and this is a little riprap that is on the bottom.

Q. Whatever gravel or rocks come down, you take them off, do you?

A. In this case, there is very, very little comes off because this rock is placed in layers. This is not from the top or anything.

Q. This is 111.

A. This is almost the same as the other picture.

Mr. Gearin: Same one.

The Court: It is just past Sardine?

The Witness: It looks like the same, that one there, quite a lot alike. It is about the same station.

Q. (By Mr. Powers): What about this one?

A. Oh, yes, this is way up by, almost Station 580. This is the detour—this is not the detour here (indicating).

Q. That is a fair representation of what it [82] was?

A. Well, it had been widened out. It was an old county road there.

Q. It shows the general lay of the land?

A. Yes, this is the highway, and this is the detour.

Q. This is the same in this picture in this vicinity as the other one except a different picture?

(Testimony of Hilding F. Lind.)

A. Yes, that is the fall there.

Mr. Gearin: One hundred seven?

The Witness: I do not think there was any trouble here at all.

The Court: It is the same picture?

Q. (By Mr. Powers): Same picture?

A. Yes.

Q. Well, excuse me, this is not on the rock, this rock is on the track and that is not, I think.

A. Yes.

Q. That is the difference?

A. Well, you see when——

Q. It looks like the same rock? A. Yes.

Mr. Gearin: It might be taken from a different view.

Q. (By Mr. Powers): It could be the wrong track?

A. Yes. It might be the same rock a few minutes later and the truck come off.

Q. Here is 101. [83]

A. This is Station 600, and that is where the detour ended. That is the fill here. This is all fill.

Q. What kind of a rock do you call that?

A. This, we had a slate in this particular spot here.

Q. You did?

A. It did not come down to the track, but it slid. This is very soft rock.

Q. Is that a ravelling-type rock?

A. No, no, that is not. That is soft.

Mr. Powers: We will offer these in evidence.

(Testimony of Hilding F. Lind.)

Mr. Gearin: We have no objection.

Mr. Denecke: When were those taken, Mr. Powers, approximately?

Mr. Powers: Well, I presume in 1948.

The Witness: Those were taken shortly, either late in 1948 or in the spring of 1949, because that is the last sections we built in the entire road.

Mr. Powers: I thought it was 1948, could have been in early 1949.

Mr. Denecke: No objection.

The Court: They may be admitted.

(Photographs previously marked Defendant Hartford Accident & Indemnity Company's Exhibits 101, 107, 110, 112, 113, 114 and 115 for identification were thereupon received in evidence.) [84]

Q. (By Mr. Powers): Now, Mr. Lind, in bidding on this job did you give any thought to doing the construction work in any other manner than the way you carried it out? A. No.

Q. Are there alternative ways in which roads of this type can be built?

A. I don't think so, not there. If I would do it again, we would do it the same.

Q. What is a pioneer road, when you build a pioneer road?

A. Oh, a pioneer road is just usually to get into places that you—there are no roads in already. In other words, it is usually in native country where

(Testimony of Hilding F. Lind.)

there are no roads, and you build a road in in order to go to work.

Q. Where you make a new road?

A. That is right.

Q. And you made a new road here, didn't you?

A. No, it is the relocation. The first two miles it, you might say—the old road ran directly down the middle of where the new road was going to be located so we did not have to pioneer those first two miles. We had no pioneering to do.

Q. You did build some new road here; did you not? A. Yes, on the east end.

Q. In building a pioneer road, that would be more expensive, would it not, from the way you carried on this operation?

A. No, not necessarily, because in most cases I think it is [85] contrary to that. A pioneer road, if you build a pioneer road you build your road in a location that, on high cuts, and you build your pioneer road so that you start at the top, and your pioneer road is part of your actual work, while if the road is already through there it sometimes is placed where it is not doing you any good. It does maybe more harm than good due to the fact that you cannot pioneer above it. You do not have room.

Q. I was concerned with cost now.

A. I know.

Q. What about cost? Would it not have been more expensive by far to build a pioneer road here where you made this new road than the way you did it?

(Testimony of Hilding F. Lind.)

A. In some cases it would, but in some cases it would not.

Q. What about the back-sloping? Can you explain to the Court what is back-sloping when you are building roads in those mountains there? What do you do when you back-slope?

A. You mean the time for sloping the backs. Well, you start up on top, as a general rule, and you bring your slope down as you come. In some cases, why, if there is no place, it is too steep to get up there, you wait until you get a roadbed, and then you slope it with a dragline or something to pull it down.

Q. What effect does back-sloping have with respect to falling rock where you are on a hillside? Does it tend to prevent [86] falling rocks or rocks from falling?

A. After the highway is done, yes.

Q. Did you carry out back-sloping along this road that we are talking about, this unit B and so on?

A. We did very little back-sloping on the first two miles of that road due to the fact that we almost had to have the road-bed in order to back-slope. In other words, it is a too-thin slice coming off. What we originally did there, we let our slopes go pretty much until we went over there to grade, and then we had a forty-foot roadbed. Then we came and back-sloped after that.

Q. If you had back-sloped before, would it have prevented some of this damage?

(Testimony of Hilding F. Lind.)

A. Might not happen if you back-sloped before, but there was not room.

Q. Was there some criticism because you did not back-slope from the Bureau of Roads and the Engineers, as you went along? A. No.

Q. None? A. No, I think not.

Q. That would not have made any difference?

A. No, in fact, you could not have back-sloped the first two miles there. You couldn't get your slope——

Q. What area, which unit is that, the first two miles?

A. The first four miles, that is A-2, the one that is in question. [87]

Q. Are you speaking about four miles now, or two miles?

A. Well, it is four miles in the entire A-2, I think.

Q. That is right, and you have been referring to two miles. Now, that should be changed to four miles; is that right?

A. Well, I spoke of two miles because the two miles are the rock, that is in solid rock, and in solid rock you don't—your slope, your sloping question is not too important because you have to take the rock out in order to have something to slope, and you cannot slope the bank until the material is out.

Q. The only way you could take rock out of here was by blasting it; was it not? A. Yes.

Q. There was no other operation that you could carry on to get that rock out of there, was there?

(Testimony of Hilding F. Lind.)

A. No.

Q. Then where you blast, and you are up high, and if you have a steep enough slope, why, where does that material go when it is broken loose? Does it go downhill?

A. Well, that is why I mentioned the fact that we used lifters and went in at grade so that we took the toe out first.

Q. Will you excuse me? If you will answer if it goes downhill or not. Does it go downhill?

A. Rocks normally go downhill.

Q. No other place for them to go, was there?

A. No. [88]

Q. What was at the bottom of the hill in most of these places where the damage occurred; wasn't that the track?

A. Well, no, we worked off the old road. We had the old road we worked off, and then below that was the highway, and below that was the railroad.

Q. At the bottom, not halfway?

A. It was clear to the bottom.

Q. You had the railroad?

A. That is right.

Q. So, if this rolled far enough, the only place that could finally stop would be down on the track?

A. If they rolled off the old road, yes. That is why we worked off the old road.

Q. Well, you were not successful in your operations there to keep the stuff from rolling down on the track, were you?

(Testimony of Hilding F. Lind.)

A. Occasionally some stuff would roll down on the track, yes.

Q. Now, to summarize, Mr. Lind, this material would get on the track from, sometimes from blasting. That is true, isn't it, that is one source?

A. Yes.

Q. And sometimes it would get there from your equipment working around up there and shaking stuff loose, and then sometimes it would get to rolling just from the men walking around, I think you said, if they were around if it was loose enough for that, was it? [89] A. Yes, it was.

Q. And then it would be steep enough for that, and the other times it would be from the snags that might fall of their own volition, or if something was cut, if the men were clearing up there they might roll down, but that was on rare occasions. Then sometimes you do not know what caused it. It was just maybe through the natural terrain up there or the natural movement of the earth, and if you were home in bed, why, they would roll down; is that correct? A. I think so, yes.

Q. It is in connection with this latter group, some five or six items, that you figured that you repaired damage for the Southern Pacific without your causing it; is that right? A. Yes, sir.

Q. And on those particular items, then, you have no contention that they were any accident as far as the Hartford is concerned, or anything like that?

A. Well, I might say that when we bid the job we knew there were—we had to take some protec-

(Testimony of Hilding F. Lind.)

tion. In other words, we put dirt on the track. If we were going to shoot and we thought, and we knew in some cases, that rock would go on the track, we would put dirt on it for protection, and possibly four shots out of five there would be no damage, so, consequently, no bills on it although every day we took rock off the track. It would be occasionally some shot would do damage which we had not [90] anticipated, yet, we would put protective covering on, and those were the only ones that we billed. We never billed for protection of the track or cleaning off of the track after. The only time we billed was when damage was done to the track by some particular rock or a greater amount of rock fell on the track.

Q. Well, then, if you summarize a little further, as I understand it, it would be a matter of your estimating. You knew certain damage would occur, but you estimated it would be less than what actually occurred; is that correct?

A. I would not say that the damage on the entire track—we spent far more for protecting and cleaning the track than we had anticipated, but I think possibly there was more damage to the track than we anticipated, but at the same time we knew that there would be some damage on the track, that type of work, from falling rocks on it, that you could not possibly avoid.

Q. Well, then, it would be—the damage was greater than you thought—I will put it that way—than you originally anticipated? I think that is what you are saying?

(Testimony of Hilding F. Lind.)

A. Well, in some respects it was.

Q. Then, to carry that a step further, when we were looking at the contract here yesterday where this provision was that you could figure your bid as to how much you were going to do this work for, and recognizing that there would be inevitable [91] damage there to the track from rock and other debris, you figured that the damage would be less than what the engineer talked about, as I understood your testimony. You had one view and the Engineers had another; is that correct?

A. No, the Engineers anticipated even less damage than what actually occurred, I would say.

Q. How do you know that?

A. Well, I just think they did.

Q. What? A. I think they did.

Q. Well, now, there were four bids on that job including your own; was there not? Are you not the one that made the low estimate as to the amount of time with a figure that you got that contract under the other contractors; isn't that the reason you got the job?

A. That job was let in four sections, and in this particular section we were the highest bidder.

Q. After you got your equipment in, isn't that true? You say that you were the highest bidder for those $2.00 a yard?

A. Yes, I think we were. I won't say on the B classification. I know we were one of the highest bidders on that particular section, one of the highest.

(Testimony of Hilding F. Lind.)

Q. Let us talk about the B classification. Will you tell the Court now that you were the highest bidder on the B classification for those $2.00 a cubic yard? [92]

A. I won't say yes or no to that because I was going from recollection. I don't remember what the other bidders bid. I do know that over the four jobs, we were only $10,000 low over the three and a half million dollar job. I do know that.

Q. Yes, but when you first went in you were a good bit lower than the others until you got your equipment in; were you not?

A. I don't understand the question.

Q. Well, the first unit, how much lower were you on the first unit that was let; do you remember?

A. All four units were tied together. We either took all four or none.

Q. Didn't you take one after you got in there, after you got your equipment in?

A. They were short of funds and only——

Q. Just say yes or no.

A. I cannot answer the question like that, yes or no.

Q. How can you say you took that, then in advance of the other?

A. We didn't. We bid all four jobs at once and tied them all together.

Q. Well, then, you can say that you did not take one after you got in there; it was not let before?

A. They were all let at the same time.

(Testimony of Hilding F. Lind.)

Q. That is what I was asking you. That is your testimony?

A. Yes, we bid on all four jobs at the same time.

Q. And you got all four jobs at the same [93] time? A. On the combined bid, yes.

Q. You say the combined bid was only about $10,000 less——

A. As I recollect it, it was about $10,000 less than the next low bidder.

Q. As the work proceeded along there, you were using about, along about a hundred ties a week because of damage along that track; were you not?

A. A hundred how much?

Q. Ties, railway ties, replacing them, those that got knocked out and jimmed up?

A. I cannot phrase the amount there. In the first place, we put our planking down——

Q. Just stick to ties now, Mr. Lind. I will get through in a hurry if you answer me. Were you not using about a hundred ties a week?

A. I do not know.

Q. Just how many ties were you using?

A. I don't remember now.

Q. Of course, the contract called for a certain type of tie. You had to have certain equipment on the job, such as ties and rails, didn't you?

A. That is right.

Q. Why did you have those ties and rails along that track——

A. Well, I think we went over that yesterday and today.

(Testimony of Hilding F. Lind.)

Q. Just for the one point that they expected this trouble? [94]

A. Well, we put in a half a mile of relocation, too, which called for ties and rails.

Q. That is right, but on the repairs itself you had to keep ties and rails on hand, didn't you?

A. Oh, we kept some, yes, for accidents.

Q. I will put it this way. You kept what the contract required you to keep, did you?

(No answer.)

The Court: Go ahead.

Q. (By Mr. Powers): I will ask you, Mr. Lind, in September, 1947, at the early part of that job when an engineer from the Hartford went down here and saw the operation that you were carrying on, if you did not discuss with him this anticipated damage that would go down from the top of the rocks and state——

A. Well, let me know what the name of the engineer was.

Q. Yes, I am just getting it here, and stated to C. A. Forbes under date—on the job in September of 1947, you discuss in the contract, and you said it was your responsibility to remove the rocks and repair any damage that is done to the track, and that that is what you were doing, and that you understood that it was the responsibility of Kuckenberg and that the insurance company was in no way concerned with that part of the damage that would result?

(Testimony of Hilding F. Lind.)

A. I don't think I ever made a statement like that because I can remember very definitely talking to a fellow, and I told [95] him at that time, I said that we, every day we had a crew down there which cleaned the railroad track prior to the train coming down. We had to go down and clean the flanges. We had three or four men doing it and rolling any loose rocks off, but any damage caused by bent rails, or anything, I never made no such statement that we would fix the railroad track because originally the contract called for the Southern Pacific to fix the railroad track itself if there was any damage. That was the original agreement.

Q. You might explain that to the Court. That was in the original agreement, but the rest of the agreement is that Kuckenberg would pay the railroad for whatever the expense was of repairing that damage; isn't that true?

A. Well, there seems to be there from the first day of the contract, that there was a difference of opinion. We had bid—we had this identical contract on the State job prior to this job, and we had had insurance with the Continental Casualty Company, and it is identically the same contract, and they paid for all that damage on the railroad track that was done. We had not paid any——

Mr. Powers: I move that that answer be stricken as not responsive to the question, your Honor.

The Court: All right, the answer is stricken.

Q. (By Mr. Powers): I was asking you about the terms of this contract, and I can hand it to you

(Testimony of Hilding F. Lind.)

if you want to see it to [96] refresh your recollection, but it is stipulated here that it was up to the contractor to check the railroad against damage and the telephone lines and the roadbed and the ballast and the ties and the track and any work of this character which the railroad was required to do on account of or for the purpose of accommodating the work of the contractor, shall be done by the railroad at the, at the expense of the contractor, and the contractor shall reimburse the railroad upon rendition of bills therefore, for all expenses incurred by it in repairing damage to railroad structures, telephone, telegraph, signal lines, any telegraph lines of the Western Union Company located upon the railroad property and repair the damage to the roadbed, ballast, ties and track.

A. Well, protect, that is true, yes.

Mr. Denecke: Excuse me, what was that question?

Mr. Powers: I do not know.

Q. You were familiar with that part of the contract when you bid on it?

A. That is right, very familiar with it.

Q. Mr. Lind, did you say something happened to your diaries, that you did not have your diaries when you prepared this schedule?

A. No, that particular schedule there is covered by the old diary before I started taking—there was one old diary in 1947 I didn't have. That is true, and I had to go through [97] the time cards. We went through the time cards and took them out.

(Testimony of Hilding F. Lind.)

Q. When did you prepare this schedule that went in evidence? A. When it started.

Mr. Denecke: What schedule?

Mr. Powers: It says on here September 18th and November 26th, 1948. That was about September, 1948, that you prepared the schedule?

Mr. Denecke: In September and November.

Mr. Powers: And November, too, I guess. Then you had some time cards to work on?

A. That is right.

Q. By that time your diary had been burned up in a fire or something?

A. Yes, the office burned down. I think that is probably it.

Q. When did the office burn down?

A. I don't remember when that burned down. I think it was burned down in the fall of 1947, I think it was.

Q. So you had to call upon your imagination to some extent to try to reconstruct to the best of your ability what you thought would have happened; is that your recollection?

A. Well, the time cards carried that out pretty well because the crews that worked on it, when they fixed rails, they put down fixing rails. When they did ordinary work like maintenance, cleaning the track, or anything like that—all that [98] crew was on steady, and those cards, of course—on the cards themselves it says whether repairing or maintenance.

(Testimony of Hilding F. Lind.)

Q. Well, that is true. I do not think we have much trouble with that, but as to what caused the damage to the track or caused the track to get laid up and require this work, your time cards would not show that, of course?

A. No, not particularly.

Q. And that is the part that we and the Court was asking about by the same token as to whether you made investigation and so on. You had to try and think back without the benefit of any kind of records; did you not?

A. Up until reasonably, up until the time of the diary there.

Q. Yes, well, now, what time does that diary start?

A. I don't know. I would have to look at that.

Q. It seems to start here about the 2nd of January of 1948.

A. Then in some cases we have——

The Court: I do not think there is any question here. He is just thinking.

The Witness: Well, he was talking about any other evidence we might give. I was thinking of our progress reports on the job, some of it appeared in that.

Q. (By Mr. Powers): What I was trying to get at, you brought up the contract, that originally the railroad was to do the work and you were to pay them for it under the contract. Now, that contract between Southern Pacific and Kuckenberg was [99] changed, was it not, and you worked

(Testimony of Hilding F. Lind.)

out the agreement here showing that you preferred to do the work; wasn't that it? Kuckenberg wanted to take care of fixing that? He could do it cheaper than the railroad and would not have to pay the railroad——

The Court: I do not understand what this testimony is about, Mr. Powers. Yesterday we determined that the only question here that we were going to decide in this hearing was whether or not these occurrences were accidents within the meaning of the policy. Now you have been talking about a contract. You have been talking about everything else when there is a very narrow issue for us to determine.

Mr. Powers: Yes, I perhaps was wrong, your Honor. I thought it had a bearing to show that it was operational damage that was occurring, rather than accident when they had agreed to do it, but I will pass that.

The Court: I think you have had testimony on that. You do not need to repeat it four or five times. We will take a recess.

(Recess taken.)

HILDING A. LIND

recalled, testified as follows:

Q. (By Mr. Powers): Mr. Lind, I am going to summarize, or try to. Out of this whole schedule that you have presented and the sums, I have a compilation here for section 12 which is [100] be-

(Testimony of Hilding F. Lind.)

tween Stations 697 and 702, starting with September 8, 1947, and ending with May 19, 1948, which is part of unit B and is 500 feet in length, and making up a total of 32 per cent of your entire claim or $14,179. Now, that 500 feet, would that be a certain cut, that would be one cut through there; would it not? A. What was the stations again?

Q. Stations 697 to 702.

A. Well, that was a very, very large cut. There was a lot of yardage in it, yes.

Q. The distance of it was 500 feet; was it not?

A. Yes, approximately; yes, that is it.

Q. That would be part of unit B?

A. That is right.

Q. You had during that period 59 different items of damage on that track; did you not?

A. Oh, I don't doubt it, yes.

Q. On that 500 feet? A. Yes.

Q. They were quite similar in character; were they not? A. Yes.

Q. Now, then, on stations, section 10, which is Stations 678 to 685, that is a distance of 700 feet, isn't it?

A. I do not know what you mean by section 10.

Q. That is section 10 in the contract and it is Stations 678 to [101] 685 that you discussed yesterday?

A. No, those are not the right stations. The B classification——

Q. This is the A classification, A classification.

(Testimony of Hilding F. Lind.)

A. The A classification runs from—B classification runs from 691 plus 85 to 714, and the rest is A.

Q. That is right, this is A.

A. You do not have it all there.

Q. I am just taking this 700 feet.

A. Oh, I see. 678 through 685. Now, let me see, you have to look at the plans because there may have been a couple cuts in there.

Mr. Denecke: I wonder if I could see this compilation, your Honor. It does not jibe with mine.

The Witness: Yes, 682 to 675——

Mr. Denecke: I am not objecting to this compilation, your Honor, but he has made statements here about where these items of damage are included here, and they do not jibe with mine.

The Court: What do your records show?

Mr. Denecke: He has them split down, your Honor, in a way by these sections which we have never considered.

Mr. Powers: What we have done, your Honor, we have taken their itemized statement and we have got together in a distance of 700 feet in unit A, and we find, we have listed here in unit A 34 different occurrences in this 700 feet, and 59 occurrences in unit B, including a distance of 500 feet, and that [102] is all we are saying that here this same thing was happening in this, in those short distances all the time. You can have this. I will give it to you now. I can sit here, and Mr. Denecke can work with me and see what I am doing.

(Testimony of Hilding F. Lind.)

The Court: Where did you find out at what station the accident occurred?

Mr. Powers: We took it from their list that they furnished us here. It starts right here, and Mr. Staats, who is a civil engineer, went over it and made this compilation for us.

The Court: All right.

Q. (By Mr. Powers): Was that one cut?

A. What was the stations again? 672 to what?

Q. No, 678, Mr. Lind, to 685.

A. No, it is a cut for a fill and the viaduct that went in there.

Q. Well, in that it would be a distance of 700 feet, wouldn't it?

A. Well, yes, on the stations, there was a bridge being built right in that 700 feet also.

Q. As I understand it, from the period from August 5, 1947, to March 18, 1948, you had 34 items of damage on the track?

A. I do not doubt it at all.

Q. Mr. Lind, is it not true that Montag had a contract down there, too?

A. A sub-contract, yes. [103]

Q. Did he sub-contract that from whom?

A. From us.

Q. Is it true that Mr. Montag had the same type of damage you were having as you were doing his work? A. Not very much, no; no.

Q. He had the same type of damage, didn't he?

A. No, not——

Q. Not as to the quantity, but the same type?

(Testimony of Hilding F. Lind.)

A. He did no dynamiting or shooting at all. All the shooting he did, we did for him. He was constructing the bridge, and they—their part of the contract was to clean off the slope so that no future rock would roll down on the track later so they barred, deliberately barred material off of the slope, rolled it down, and they had some accidents, I mean some damage there.

Q. It would roll down and do some damage to the track occasionally; is that right?

A. Well, they barred it down in most cases. They had to clean that. That was part of their contract. I think we did their shooting for them.

Q. Where there were damages to the track, did they report it? Did they take care of it?

A. We did some work for them because they didn't have a contractor.

Q. Whatever you did, they would pay you for it, I take it? [104]

A. No, they didn't pay us for it at all because we traded around.

Q. You traded?

A. We never received no pay for that, but none of that is in our bill, any of that work there.

Mr. Powers: I believe that is all.

(Testimony of Hilding F. Lind.)

Redirect Examination

By Mr. Denecke:

Q. Mr. Lind, do you know approximately how much the cost was of establishing and maintaining the detour?

A. Including everything, the maintenance, just the maintenance and the pilot car and the cleaning off of the track, that work that we did on it, it was pretty close to a hundred thousand dollars.

Q. Do you know whether or not any part of that cost is in this particular claim?

A. It is not there, none of it.

Q. Do you know, Mr. Lind, whether or not a substantial sum was spent by Kuckenberg for repair of damage of the track which is not included in this particular claim? A. Yes, I do.

Q. On Station 714 which you testified to the other day, do you know approximately what the cost of repairing the damage there was?

Mr. Gearin: Just a moment, Mr. Denecke, 714 is what, [105] Mayflower Creek?

Mr. Denecke: No, it is 624.

Mr. Gearin: That is not one of the claims against us?

Mr. Denecke: No, you are out of that.

Mr. Gearin: All right.

The Witness: Well, I don't know because I didn't make out the aggregation there as to how much we spent because I knew it was outside the

(Testimony of Hilding F. Lind.)

scope of insurance, at least the way we had it interpreted, and we shot down approximately—I think the intention was to shoot down about 19,000 yards, or something like that, and I think a total of about 26,000 came down, and we spent probably ten to fifteen thousand dollars removing that rock. Prior to shooting we had put on about six or seven feet of dirt, maybe not that much, five feet of dirt over the track thinking that the track would not be damaged, and then when we had this shot, the terrific weight pushed the railroad out, and we removed all the rock and did the grading and furnished the ballast and hauled from the ballast pit, and the only part I charged against insurance was the actual cost of the track itself, that is, the rails that were lost and the labor. I think we probably spent $20,000 in that cut.

Q. (By Mr. Denecke): In this particular claim, Mr. Lind, is there any cost inserted for cleaning track on items where there was no damage?

A. No, sir, there is none there. We did that every day. In [106] fact, we had traffic through there every hour on the hour from one end, every half hour on the other, and we were working three or four places along the track, and we would have, always have a man down there to clean the track off prior to the traffic, and then we would wait, and all of that cleaning and none of that is there; that was part of the job.

Q. When you testified yesterday that you put a protective covering of dirt on the track, what is the

(Testimony of Hilding F. Lind.)

fact as to whether or not that was successful or unsuccessful in preventing damage?

A. Well, we knew we couldn't protect it a hundred per cent by putting dirt on, but our damages only amounted to probably a fiftieth part if there had not been something on there, but, occasionally, why, a rock would roll around and such that it would hit in a certain position, and it would break a rail, but most of the time, why, we did not repair rail. Most of the time we were on construction work. I would say about every fifth time, maybe, that you put rock on a track that you do any damage. The rest of the time, why, we didn't have damage.

Q. A great deal of that damage, Mr. Lind, as I understand it, was caused by an occasional rock falling on the track, from equipment working or blasting; is that correct? A. That is right.

Q. As far as this derailment on Mayflower Creek is concerned, did you inspect the trucks of the car or cars that were involved? [107]

A. I did.

Q. You testified yesterday about a thin flange. Was there anything else about the car that could have caused the accident?

A. No, the only thing, it was on a slight curve, and there is always a chance of trucks not turning freely or something like that with a thin flange which might cause the accident, or something like that.

Q. Mr. Krill is in the courtroom there sitting over to my left of the table. Did he come down to

(Testimony of Hilding F. Lind.)

the job and talk to you?

A. Oh, yes, I saw Mr. Krill.

Q. On approximately how many occasions; do you remember?

A. I don't remember exactly. Probably three or four times or two or three times, at least.

Q. Did you discuss with him the damage to the track?

A. I did, but particularly I can recollect the one time particularly about at the damsite cut when I think I talked to him there, and I told him that we—he was saying that he thought a lot of the damage was due to operations, and I said, "Well, there is a lot of it that is accidental," I says, "We have no control over it." I said cleaning the track, taking the—using the maintenance crew, taking the rocks off of the track where no damage existed, why, I felt was our responsibility, but I interpreted it as such that the insurance in the event of a damage, that is why the additional policy was issued for this particular part of the job. [108]

Mr. Denecke: That is all, your Honor.

Mr. Powers: No more questions.

Mr. Gearin: I have a couple.

At this time, your Honor, I have talked to counsel, and they have agreed that I might amend our contention number 6 in the pre-trial order, page 23a, line 22, by the addition of the following words appearing after the word "track" on said page, said section, said line, by the addition of the following: "and delay to trains."

(Testimony of Hilding F. Lind.)

The Court: Any objection?

Mr. Denecke: Your Honor, I was going to examine our bills, which I have not done yet.

Mr. Powers: Page 26?

Mr. Gearin: Page 23, section 6.

Mr. Denecke: It is stated that is the way it was in the bills. If that is correct, we certainly had ample notice, I think.

Recross-Examination

By Mr. Gearin:

Q. Mr. Lind, you know of your own knowledge there that the trains were delayed on many, many occasions; were they not? A. Yes, they were.

Q. And sometimes the trains would be delayed for a period of days?

A. No, we had made an agreement with the—on one particular [109] shot where the, where we shot, we asked that—it was a Friday evening we shot, and they usually worked half a day on Saturday, the train did, and we made an agreement with the railroad company that they would not run a train on that particular day. Then there was one other time when the train was delayed. It may have been days; it may have been two days, and that was when we had a very bad storm up there and the fill went out, and the entire roadbed for four miles was almost impassable for anything, and that was during that storm when we lost a large fill, washed out the railroad track.

(Testimony of Hilding F. Lind.)

The Court: What issue are we talking about now?

Mr. Gearin: Well, the issue here, your Honor, is a part of the—I thought we were going to try yesterday the items of damage insofar as the Southern Pacific Company is concerned. One of the issues which we are going to try here is not the amount but the damages sustained by Southern Pacific as set forth in one of its contentions by way of counter-claim.

The Court: The statement in the exhibit from which he read yesterday indicated, I think, at Mayflower Creek or one other place, that the trains were held up for a period of three days.

Mr. Gearin: That is correct, your Honor. I just wanted to have him testify that there was delay occasioned by their operations. I am not going into that any more.

Q. Referring to the photograph, 107, which you identified before, Mr. Lind, would not rocks of that size roll down, [110] rolling down, coming on the rail, either bend the metal itself of the rail or break a tie?

A. Yes, if it would hit it right, it could.

Q. Yes, and do you know or have you any idea or can you advise the Court, Mr. Lind, of the number of rails that were so broken or the number of ties that were broken?

A. I couldn't offhand, no, because there was quite a quantity of them.

Q. On these items of damage for which you

(Testimony of Hilding F. Lind.)

billed Southern Pacific Company, Mr. Lind, were those caused by accident or by operational damage? Do you understand my question? Were they accidental?

Mr. Denecke: Your Honor, I am afraid we are getting into something here which is just legal terminology. I object to the question.

The Court: Of course, this is cross-examination. These are two alternatives. There is still a third alternative.

Mr. Gearin: Well, I will ask this question, to be fair to the witness, your Honor.

Q. Mr. Lind, you have billed the Southern Pacific Company as follows: The Mayflower Creek washout, the boulder falling on the track at Station 699, and the Sardine Creek derailment. Would you say that those three items were or were not caused by accident?

A. Might I explain that the Mayflower Creek was from the washout, [111] the culvert plugged up. That, to me, would be on nothing you could control, and if you could not control it, I would call it accidental. The boulder falling on the track, if the boulder has been there and nobody—it just automatically rolls down, I would call it accidental.

Q. Do you recall Mr. Clark sitting back there?

A. Yes.

Q. Do you recall that Mr. Clark was injured when one of these shots went off?

A. I don't know whether he got hit with a shot

(Testimony of Hilding F. Lind.)

or not. I thought a rock rolled down on him or something.

Q. Do you recall the damage to the loaded water tank and water track at the time of the Mayflower Creek washout?

A. Yes, I do. In fact, I think we repaired it.

Q. That is right, that was repaired by the Southern Pacific Company. Do you recall that the Southern Pacific Company, in the month of December, 1947, changed a rail which was damaged due to blasting?

A. You mean the section crew?

Q. Yes, the Southern Pacific employees up there, do you recall them doing any work in December, 1947, in the matter of changing a rail?

A. I don't doubt it, but I say I don't recall it.

Q. In other words, you do not deny it, then, do you? A. No, I couldn't deny it. [112]

Q. Do you recall in June, 1947, a tree falling on a track and the Southern Pacific crew was out there working on it, in which they used some 90 feet of rail?

A. Yes, I do faintly remember that. In fact, I think we helped them out on the deal, if that is the one that I have in mind.

Q. But they had some S.P. employees up there?

A. I think Clark and Ross, the two men, and they usually—as far as concerned any work we did on the track, why, they usually were the section foremen. They more or less ran the crew.

(Testimony of Hilding F. Lind.)

Q. In other words, you provided the men, but they provided the supervision?

A. Yes, they were on the job. As a rule, we didn't have track workers, so they bossed the gang.

Q. The Southern Pacific supplied the rails and the ties?

A. Well, we furnished the rails and the ties, as a rule. We paid S.P. for them, I understand. In fact, we bought our own ties.

Q. Do you recall damage to the sidewalk and handrail on the trestle on the bridge in June, 1947, when they had what you call a BB gang up there working?

A. I think I faintly remember it was a clearing operation, a clearing contractor, if I remember.

Q. Damage to the bridge? A. Yes. [113]

Q. Was the clearing contractor subbing for you?

A. Yes, he was. I think a tree got away from him or something.

Q. Do you recall that in August, 1947, that there was some repair work done to the track by the Southern Pacific Company?

A. No, previous—I think most of this that you are getting here is when we first started. Southern Pacific were doing quite a bit of repair to the track prior to this meeting we had with the Bureau and the railroad company, and then we more or less—it was at that meeting it was decided we would do the repair under their supervision, but I think most of this is prior to that.

Q. Do you recall that on August 23, 1947, the

(Testimony of Hilding F. Lind.)

Idahoan train was delayed and a train was cancelled because of blasting and slides in the vicinity—well, we have our own mileposts, but do you recall that occasion?

A. Yes, I think that is that storm, I think. What date was that, now?

Q. August 23, 1947.

A. Oh, well, that was through this arrangement that we made with the Southern Pacific. That was made before—we have a letter on that. That was made prior to our shooting that we agreed to pay for their not running Saturday. That was all arranged before the shooting.

Q. Now, do you recall any repair work in 1947, repairing of the track of the Southern Pacific Company after blasting? [114]

A. Yes, we had about 20—we knew we would not have enough men to fix it. After the shot, why, I think one of the railroad officials called Albany, and we got a section crew out of Albany. In fact, we fed them in camp. That is true.

Q. Taking October, 1947, do you remember the BB gang came up again in October, 1947?

A. Well, I cannot definitely say I remember that particularly. What did they do, does it say?

Q. I have 30 feet of Number 62 rails, and 500 tie plates, 500 track spikes, 175 track bolts, 170 lock washers, and matters like that in 1947. You do not deny that there was work performed by Southern Pacific with their own employees and materials

(Testimony of Hilding F. Lind.)

furnished as a result of track damage in October, 1947, do you?

A. No, I cannot in October. I cannot understand where they put all them rails. The BB gang, they just work them bridges.

Q. Would the same be true in September, 1947?

The Court: How do you expect him to remember that far back?

The Witness: I do not remember that.

The Court: Bring them on in your case.

Q. (By Mr. Gearin): Do you recall any specific example at all, Mr. Lind, of what you have referred to in the documents that you prepared here where there was damage to the tracks that was repaired by the Southern Pacific Company?

A. Would you say that again? [115]

Q. Do you recall any example or any time at all where damage was done and it was repaired by Southern Pacific Company with their own men and their own material?

A. No, not—I did know that there was some before this meeting, but since then if they had done any repair it must have been emergency, and I was not notified, or at least I didn't know it.

Q. Do you remember or recall on October 13th, 1948, that there was some $1200 worth of tracks delivered to Kuckenberg by Southern Pacific Company? A. Yes, I think I remember that.

Q. Do you recall whether or not Kuckenberg ever paid for it?

(Testimony of Hilding F. Lind.)

A. I don't know whether it was paid for. That is out of my department.

Mr. Gearin: I have no further questions, your Honor.

Mr. Denecke: No more questions, your Honor.

Recross-Examination

By Mr. Powers:

Q. You mentioned something about paying the Southern Pacific so they would not run their trains on, what was it, over the week end? What was it, Saturday and Sunday they wouldn't run them?

A. Just Saturday. They didn't run Sundays. They ran half days Saturdays.

Q. Why did you want the train stopped? [116]

A. Well, that particular case is where we were shooting this big rock, and in this one cut we knew that we were going to have the stuff on the track. We covered the track there, but we knew that it would take us a day or so to uncover the track again.

Q. That was only one time that you did that?

A. Well, yes, that was the only time.

Q. You did not do it week in and week out; just that once?

A. Oh, no. That was the only time. We had already made arrangements that it would not go.

Mr. Powers: That is all.

The Court: Is it a fair statement to say that at the time you submitted your bid and at the time you took the job and during the course of the con-

(Testimony of Hilding F. Lind.)

struction you and your principals knew that it was practically impossible to protect against all damage; that some damage might result?

The Witness: That is true, yes, sir, and we thought—that is why the additional insurance was necessary.

The Court: As a result of the precautions which you took, namely, of covering over the tracks, you were in a position to minimize that damage and the damage that actually resulted was only about one-fiftieth of what would have resulted had you not taken the precautions?

The Witness: That is correct.

The Court: And that when you did cover over the tracks, [117] you only had an anticipated damage about one out of every five times?

The Witness: Possibly so, probably less than that.

The Court: That occurred not—this damage resulted not only from blasting, but also from loosening of the rocks that occurred in connection with the use of equipment?

The Witness: Correct.

The Court: All right.

Mr. Denecke: That is all I had.

Mr. Powers: That is all, Mr. Lind; thank you.

(Witness excused.)

Mr. Denecke: Your Honor, that is the only testimony I have on this phase of the case. However, it occurred to me, your Honor, that Mr. Powers has

these witnesses of his here which I would like to—well, I don't know whether he plans to use them on the other phases of the case or not. I am not speaking of the amount, your Honor. He has raised certain defenses here.

Mr. Powers: I thought we were just trying the accident part first.

The Court: He is resting on the accident phase of it.

Mr. Powers: Yes, I have witnesses on the accident part of it.

The Court: We will take a five-minute recess.

(Recess taken.) [118]

HENRY R. STAATS

a witness produced in behalf of defendant Hartford Accident & Indemnity Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. Where do you live, Mr. Staats?

A. 2907 Southeast Hawthorne.

Q. What is your occupation?

A. I am a Civil Engineer.

Q. Where did you get your training for this particular type of work?

A. I am a graduate of the University of Nebraska.

Q. When was that? How long have you been an engineer? A. Since 1930.

(Testimony of Henry R. Staats.)

Q. What type of work have you been doing since you graduated and started practicing?

A. Well, I have had general practice. I worked for the Nebraska Highway Department, Oregon Highway Department, National Park Service, Army Engineers.

Since 1946 I have been in private practice.

Q. In connection with your practice have you had anything to do with building roads and highways, their maintenance?

A. Oh, I have done some layout work, and I have had some experience with it; yes, sir.

Q. Did you at my request go and inspect this job? [119] A. Yes.

Q. Then you had the contract made available to you and the items of damage as claimed by the plaintiff here? A. Yes, sir.

Q. You made a summary, did you not, of the locations where the damage occurred and the frequencies of occurrence, and so on? A. Yes, sir.

Q. What was this summary made from? Was the list that we gave you the items they were claiming in damages?

A. Yes, sir, I believe it was the invoices of the Kuckenberg Company.

Q. You had this prepared or prepared it yourself? A. I prepared it myself.

Q. You prepared it yourself. Referring now to Section 12, Station 697 to 702. A. Yes, sir.

Q. That would be a distance of 500 feet; is that correct? A. Yes, sir.

(Testimony of Henry R. Staats.)

Q. How many items of damage occurred in that distance of 500 feet? A. 59.

Q. And the total amounts that—that was from the period of September to what, 1947, to May, 1948. Is that correct? A. That is correct.

Q. The total damage was—— [120]

A. $14,179.09.

Q. Is that part of Unit B?

A. That is part of Unit B.

Q. Then what is this station 678 to 685?

A. Well, that is another section that had a great many occurrences.

Q. Is that in Unit A or Unit B?

A. That is in Unit A.

Q. What length or what section would that be comprised of? A. 700 feet.

Q. How many different items of damages claimed there? A. 34.

Q. That began August 5, 1947, and ended March 8, 1948? A. Yes, sir.

Q. In your inspection of the job and carrying on that, was there any way to get the rocks out other than blasting——?

A. No practical way.

Q. And moving it down? These sections that you saw, what was at the bottom? From your experience where would this rock go?

A. It would go down. It was on a hillside, it had to go down.

Q. What would it go down to; what was down there? A. Well, the track and the river.

(Testimony of Henry R. Staats.)

Q. Was there any other place it could go?

A. Well, in some places there was a little of it that could hang up on a very narrow county road there. [121]

Q. From your analysis here would this be operational in character? Would it be reasonable to expect it to have been caused by operation?

Mr. Mautz: We will object to that as calling for a conclusion.

The Court: I think that is what I have to decide, isn't it?

Mr. Mautz: Yes.

Mr. Powers: You may take the witness.

Cross-Examination

By Mr. Gearin:

Q. Mr. Staats, what would be the natural and probable consequences of blasting on a hillside with reference to the tracks down below?

A. Part of the rock, if there was—except for the little that hung up on the county road, it would go down there.

Q. What would be the distance, the average distance between the rock that would go down below and the track itself? Would it be five feet, ten feet, fifty or a hundred feet? Can you give us the extremes of distance there, Mr. Staats?

A. Well, in some instances it was practically a straight cliff that overhung the railroad, and in other instances it was back maybe, oh, any amount, but it is a narrow canyon.

(Testimony of Henry R. Staats.)

Q. What would you say from your experience in this type of operation, what would you say as to whether or not the damage to the track would or would not be anticipated by the blasting [122] or removal of rocks from the overhang or the uphill side of the track?

A. If it was not protected there would be damage, I presume.

Q. Is there any way known to protect track from damage under similar or like circumstances?

A. I would not be an authority on that. I would not know.

Mr. Gearin: I have no further questions.

Cross-Examination

By Mr. Denecke:

Q. Mr. Staats, when did you inspect this operation? A. In April, 1951.

Q. In April of 1951. The work was completed then? A. All completed, yes.

Q. By that time, places were there—I mean all of the cut and fills were made?

A. Yes, sir; however, I was with the Army Engineers in charge of that reservoir work so I was very familiar with the canyons before then.

Q. Did you have plans of the job with you when you inspected it? A. Yes, sir.

Q. It is possible, is it not, Mr. Staats, when shooting rock even on the side of a hill if the shot is placed correctly and the rock is anticipated, that

(Testimony of Henry R. Staats.)

the rock will merely be loosened and left in place there? A. Theoretically, it is possible. [123]

Q. Well, the bulk of it—if things go right the bulk of it should stay there; should it not, or is that one that you cannot say?

A. I would not, not, I would not qualify as a powder expert to that extent.

Mr. Denecke: That is all, your Honor.

The Court: Any further questions?

Mr. Powers: No more.

The Court: That is all, Mr. Staats.

(Witness excused.) [124]

WENDELL C. STRUBLE

a witness produced in behalf of defendant Hartford Accident & Indemnity Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. Mr. Struble, you were the Resident Engineer on the Kuckenberg job we are speaking of?

A. That is right, I was the Resident Engineer through most of the construction. However, I did not finish it. I was taken off the project in October, 1948, and the work was completed, was not completed until 1949, I think.

Q. Well, you were there from the beginning during that time which includes the time we are concerned with here or that period?

(Testimony of Wendell C. Struble.)

The Court: Resident Engineer for whom, for the State of Oregon?

The Witness: For the Bureau of Public Roads.

Q. (By Mr. Powers): What were your duties there, Mr. Struble?

A. Well, it was the general supervision of construction and the laying out of the work, measuring quantities and determining payoffs.

Q. When the contracts were let, the four contracts they talked about here, what was the difference in the bid between Kuckenberg and the next lowest bidder?

A. Well, we took bids on the—(consulting notes.)

Q. Just state the over-all, for what and how much lower was [125] Kuckenberg in the over-all than the next lowest one on the four contracts as he testified.

A. $71,600. That is a matter of public record in our office.

Q. Yes, that is right.

What was the nature of the terrain there in the parts where the railroad track was being damaged?

A. Well, it was a precipitous terrain, largely solid rock. The railroad ran concurrently with the highway, and over part of the distance was very close—I mean 15, 20, 23 feet—just clearance for the track, and then it gradually deviated to perhaps maybe 100 or 150 feet away from the railroad track at a higher elevation.

Q. In letting this contract for the construction

(Testimony of Wendell C. Struble.)

of the road was there any provision or any anticipation made for damage to the track which would occur in the operations of the contractor?

A. Not as far as we were concerned; however, we anticipated damage, and we had set up what we thought was the most difficult section, and we estimated at a higher price to take care of the additional cost of construction.

Q. Would that take care of any damage in replacing and repairing track and so on?

A. That is hard to say. I could not answer that because it depends on how much would develop.

Q. Have you had a chance to look at your notes and look at the items of damage claimed? [126]

A. Well, I looked them over yesterday, but——

Q. How frequently when they were in this close proximity to the track would material come down on the track? Was it a daily occurrence or otherwise?

A. It was pretty general. Throughout both the blasting and the digging of the material it was—perhaps there would be some material would come down nearly every day, and maybe some days there would not be enough to make a great deal of difference, but probably some material was lost every day.

Q. Where would that material go to?

A. Well, it would generally go down to the railroad track.

Q. And on the track and around the track?

A. Well, sometimes it would stop there. Some-

(Testimony of Wendell C. Struble.)

times it would go clear over, but it would depend on the volume of the material that came down.

Q. There is a river down below part of it there?

A. The river below the railroad track.

Q. So at times some of the material was deliberately shoved down by bulldozer onto the track and another bulldozer down there shoved it off?

A. Quite frequently there was a bulldozer down there shoving it off, yes, not always, but as cuts were being opened up and there would be no chance to control the material it would spill over, and they would have a bulldozer to remove the material.

Q. That bulldozer would be kept right down there along the [127] tracks, would it?

A. Pretty much, pretty frequent, yes.

Q. Who did you look to to remove that material and to protect the track? Whose obligation was that? A. The contractor's obligation.

Mr. Powers: That is all.

Cross-Examination

By Mr. Gearin:

Q. Mr. Struble, as a matter of fact, didn't the operations there just generally raise the dickens with the track down below?

A. Yes, they—the track took quite a battering from the operations above.

Q. Yes, and while you were Resident Engineer on the job, isn't it true that many times the Southern Pacific Company by its own force would expend

(Testimony of Wendell C. Struble.)

labor and materials to repair the damage that was done?

A. Well, I think there were one—I couldn't state that because I don't know; however, I think that there were times when the S.P. did send their own work crews in to augment the contractor's forces to expedite the opening of the track.

Q. Is it a fair statement, Mr. Struble, that you remember it being done, but you do not recall the number of times?

A. No, I would not know. I am sure they sent in a work crew when they did work to the Sardine Creek bridge that was damaged by storm. That is one occasion I recall, but just how many more [128] I don't remember.

Q. Do you know that—well, I will ask you whether there were occasions when the trains were delayed by the operations of Kuckenberg Construction Company?

A. There were minor delays to the train, yes, other than the repeated major blasts that we did have, and we notified the train when, in some cases there were arrangements made not to run the train up for the very major shots.

Mr. Gearin: I have no further questions, your Honor.

Mr. Powers: I neglected to ask Mr. Struble two questions, your Honor.

Q. Mr. Struble, did the contractor, Kuckenberg Construction Company here, make a claim to the

(Testimony of Wendell C. Struble.)

Bureau of Roads for these items of damage as extra work under the contract?

A. No, I do not think—not to my knowledge they did. I do not think so, but they could have after I left the project, but I don't think they did.

Q. Well, what about the Mayflower Creek? Do you remember anything about it?

A. Yes, very well.

Q. Was a claim made for that? Was a claim made by the contractor for the extra work at Mayflower?

A. Claim was made at Mayflower Creek, yes.

Q. And was it allowed?

A. It was not allowed. [129]

Q. Why not?

A. It was turned down by our Washington office, and I do not know just what action, what the recommendations were here at our office, but it was turned down at Washington.

Mr. Powers: That is all.

The Witness: I couldn't answer why it was not allowed.

Cross-Examination

By Mr. Denecke:

Q. Mr. Struble, do you remember going to Mayflower Creek at the time when the S.P. was derailed and one car or more went in the river?

A. Not at Mayflower Creek, no. I remember a derailment at Sardine Creek, but not at Mayflower Creek.

Q. At Sardine Creek you remember a derail-

(Testimony of Wendell C. Struble.)

ment? A. Yes, I remember that.

Q. That was in the first part of January?

A. I think perhaps so.

Q. Did you inspect the trucks on the—or the wheels on the car or cars?

A. I inspected, unofficially I inspected it with Hilding Lind. We went out and looked at it.

Q. Did you find that the flanges were thin on the trucks there?

A. That was the, what we thought, that the flanges were worn on a couple of the trucks or tracks; trucks, I guess.

Q. Was there anything that you saw on the rails or roadbed that [130] could have caused a derailment?

A. No, as far as we could see, the roadbed was open and clear.

Q. Mr. Struble, the $71,600 figure that you gave as to the difference between the Kuckenberg Construction Company bid and the next lowest bid, was that on all four jobs?

A. That is on all four projects.

Q. The total projects amounted to, the total bid amounted to how much?

A. The total bid amounted to—Kuckenberg's bid was $3,228,177.

The Court: That is not very much over, is it?

The Witness: No, that is quite close bidding, very close bidding, very close.

Q. (By Mr. Denecke): Mr. Struble, you mentioned that some stuff was rolling down the hill

(Testimony of Wendell C. Struble.)

onto the track there quite frequently. On many, many occasions that did not do any damage to the track, did it?

A. No, the damage is generally contingent upon the size of material. If a big rock rolls down, why, it will do damage, where if it was fine or dirt, why, it would probably have little effect on the railroad track.

Q. As far as the rolls were concerned, the only damage that would be done was when one of the big rocks actually hit the rail?

A. That is where the principal damage was done, yes.

Q. And there was planking, was there not, across the road [131] between the rails?

A. That is right.

Mr. Denecke: That is all, your Honor.

The Court: Let me ask some questions.

Examination by the Court

Q. Have you had experience with blasting?

A. Well, not personally; however, I have been acquainted with blasting for 25 years or 30.

Q. In your opinion, can an experienced powder man who has examined the location where they are going to blast and the type of rock to be blasted and the amount of powder that is going to be used, and how it is, how the powder is placed in the rock and all the other factors that an experienced powder man takes into consideration, could

(Testimony of Wendell C. Struble.)

he determine with reasonable certainty the amount of rock that will be moved and where the rock will land?

A. Well, they can tell pretty close, but when they loosen the rock up on the hillside and it comes over at all, I mean where it is above your railroad track, anything, any spillage whatever, will do the damage even though the shooting and the loading was perfect. Anything that would come out of the roadway prism would naturally fall to the railroad.

The shooting was good. They had very competent men to blast these cuts, good experienced men.

Q. Is it a correct statement that it is practically impossible [132] to always determine in advance what will happen?

A. No, I can't say it is, because there is an unstable, that is, faults in behind your cuts, your big cuts, that nobody could determine. Nobody could be 100% accurate.

Q. I used the word "impossible" rather than "possible" so your answer is that it is practically impossible to determine in advance just what is going to happen because there might be seams, faults and other things in the rock?

A. In the character of the material we have on the North Santiam there is a difference in our rock.

Q. Many unusual and unanticipated things happen? A. That is right.

Q. When you blast? A. That is right.

The Court: Any further questions?

(Testimony of Wendell C. Struble.)

Redirect Examination

By Mr. Powers:

Q. Well, I might ask you this question. What was blasted or pulled out of there, it had only one place to go, did it, down on the tracks?

A. If it started to go, it only had one place to go. That is down on the railroad track, yes.

Mr. Powers: That is all.

Recross-Examination

By Mr. Denecke: [133]

Q. Mr. Struble, a great deal of it was caught in certain sections by the road that was already there; was it not?

A. Well, that was true in the very early phases of construction but after the first shooting there was no road there. I mean that became filled up, and there wasn't any road. It was obliterated. The first little shelf or bench after the cuts were opened up would pehaps retain some material, but that was minor.

Mr. Denecke: That is all.

Q. (By Mr. Powers): You say that was minor?

A. It would be, yes.

Mr. Powers: Thank you, Mr. Struble.

(Witness excused.)

The Court: Call your next witness.

Mr. Powers: The other witness is also from the Bureau of Public Roads and he will not be back until this afternoon. He has been out of the City, and I think Mr. Gearin could go ahead. I perhaps won't even call him.

Mr. Gearin: I have two witnesses, your Honor.

The Court: Go ahead.

Mr. Gearin: Call Mr. Roy Ross. [134]

ROY ROSS

a witness produced in behalf of defendant Southern Pacific Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Where do you live, Mr. Ross?

A. Temporarily at Roseburg, Oregon.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. For how long a period of time have you been employed by Southern Pacific?

A. Approximately eight years.

Q. Doing what type of work?

A. One year as a laborer and the rest of the time I have been a foreman.

Q. Foreman of what type of crew?

A. Track maintenance.

The Court: What type of crew?

The Witness: Track maintenance, sir.

The Court: Track maintenance.

Q. (By Mr. Gearin): You have heard the

(Testimony of Roy Ross.)

testimony about the relocation of the highway here. Were you down on the job, Mr. Ross, and if so, what was your position at that time?

A. They put the job up for bid——

Q. I mean, is that your bid with the [135] company?

A. The Southern Pacific Company put that job up for bid as a foreman's job with an extra gang, and I was there approximately a year.

Q. During what year, what months?

A. From the first of September, 1947, until sometime in August, about the middle of August in 1948.

Q. Generally, will you describe briefly, Mr. Ross, what the effect of the activities of Kuckenberg Construction Company were with reference to the tracks? I will strike that question and ask a preliminary question. What were your duties up there as foreman?

A. Well, I was to see that the track was clear for the trains, protect the trains so they could get through, and I worked the contractor's men in repairing the track. I used them to help repair the track when available.

The Court: To what issue is this testimony directed? I do not understand it. To what issue is this testimony directed?

Mr. Gearin: Preliminarily, I want to ask him, your Honor, about Sardine Creek, the Mayflower Creek, Station 699, the reconditioning of the entire roadbed. I want to have testimony that he knew

(Testimony of Roy Ross.)

what was going on down there so he could testify to it.

The Court: This is on the question of whether or not Kuckenberg did work for Southern Pacific which was in the nature of maintenance work for the company? [136]

Mr. Gearin: That is right. I think, your Honor, the first item for which claim is made, the Station 620, August 27th, the testimony of Mr. Lind that the tree on the track was caused by their blasting so I am not going to direct any testimony to that.

Mr. Denecke: That is right, your Honor.

The Court: Go ahead.

Q. (By Mr. Gearin): Mr. Ross, do you remember the train derailment at Sardine Creek?

A. I do.

Q. Will you tell the Court just what type of trackage there was and what was around on the ground at the time or just before the time of the derailment? A. Sometime prior to that?

The Court: What date did that happen?

Mr. Gearin: That happened on October 7, 1947, your Honor. It is about page 8 chronologically on the document that you have before you.

The Court: I have it.

The Witness: Sometime before that they had turned a tractor around there and broken a rail in two, brought a cutting torch down there, a derail of 33 feet long, and cut off 16 and a half feet, got another rail that had been broke, cut off 16 and a half feet and put the two pieces of rail together

(Testimony of Roy Ross.)

in order to make a full rail because we did not have any rail to do it [137] with. There were no replacement rails. We put that rail in there, and we were supposed to go over this track with a motor car where we could see it good, but we couldn't get through because there was dirt in the flange, and the motor car would not roll on the dirt, so I used my own personal pick-up, and I drove ahead of the train that night, just stayed approximately three to five hundred feet ahead of the train because there had been—because the train was running about eight miles an hour. I went around a curve, and Mr. Clark, my assistant foreman, said, "What happened to the train?" Well, we stopped in the clear, waited about five minutes. That train did not show up. We went back up there, and there were two cars almost totally off of the road, that is, off of the ties and another car was—the wheels were on the planks.

Q. Did you subsequently thereto inspect the track where they had made this joint or repair work?

A. Yes, with our road master, he is my next highest foreman, with him, and I don't know who else, and we looked and we found that this wheel had climb off this place where it had been cut in two and welded because the rails didn't exactly match and were—I don't know why they didn't because the angle bars would line them up perfect, but this rail had been bent, and we had to straighten it back with a rail bender the next day and where it lacked

(Testimony of Roy Ross.)

three, around three-sixteenths of an inch, the wheel marks where it crawled off showed very plain [138] where it rolled across the rail.

Q. Who repaired it the next morning?

A. John Clark, and I don't remember whether we had one or two of the contractor's men, and myself.

Q. Do you recall the Mayflower Creek washout?

The Court: I didn't hear the first part of the witness' testimony. Will you tell me about what happened? You went down with your pick-up, as to what repairs were done on this road, I didn't get that.

The Witness: Sometime before the derailment there had been—they had turned a tractor around on the track, and the cleats or Grousers had caught on the track. They had straddled the rail, and when they turned it, it bent the rail until it could not be straightened up with a rail bender so we got 16 and a half feet which would be one-half a rail, and took another part of a rail, cut off 16 and a half feet, which would make a complete rail, and replaced this rail that had been damaged with the tractor. We put that in there, and we preceded the train then with a motor car supposedly, but the flangeways where the flanges of the wheels on the motor car holds onto the rail to keep it from coming off the rail was full of dirt, and you couldn't roll the motor car so we used our pick-up to pilot ahead of this train running from three to five hundred feet, just keeping away from him.

(Testimony of Roy Ross.)

The Court: I understand that part of your testimony. Was [139] this the first train that went over this portion of the track after it had been repaired?

The Witness: No, your Honor.

The Court: There had been other trains?

The Witness: Yes.

The Court: If this train was going eight miles an hour would a deviation of three-sixteenths of an inch have derailed a train?

The Witness: I am not an expert on that part, but it did go off at—the wheels marks showed where it rolled across the rail. It showed that it did go off at the joint.

The Court: After the accident, you found that there was—at the joint it was not lined up perfectly, that there was a three-sixteenths-inch deviation?

The Witness: Approximately, your Honor.

The Court: Did you inspect it before to determine whether or not there was that deviation?

The Witness: It was impossible to say, your Honor, to inspect all of this because they were covered up with water. There was water and mud on the track until you couldn't inspect every one every day.

The Court: Who was in charge of the job of taking care of that portion of the rail that was bent as a result of the Grousers having bent it? As I understand, you had a tractor turn around and the Grousers on the plates bent the rail? [140]

The Witness: That is right, your Honor.

(Testimony of Roy Ross.)

The Court: And then you cut a rail in half to put in a new section?

The Witness: That is right.

The Court: Who had charge of the work of putting in that new section? Did you do it, or did Kuckenberg's men do it?

The Witness: I was there, and Kuckenberg's men did the work, your Honor.

The Court: That is all. I have it all now.

Q. (By Mr. Gearin): Now, Mr. Ross, going to the Mayflower Creek washout, January 7, 8, 9, and 10 of 1948, will you tell the Court what you know about what transpired at that time and that place?

The Court: You will have to tell me the date again, what date?

Mr. Gearin: That is January 7, 8, 9, and 10.

Mr. Denecke: Page 11, your Honor.

Mr. Gearin: The Mayflower Creek washout.

The Court: All right.

The Witness: They had one of those floods that—I don't know whether it is very common there or not, but they did have a flood, a flash flood and washed down a lot of red clay, and it was some kind of small rock that was in this clay that they make a fill out of, and there is—if I remember right, it is a three-hole opening, a little piling bridge. Well, this [141] washed into this little bridge and filled it up except about half of one of the openings. There was no place for that water to go then for the bridge was filled up with this mud, brush, that came down. Then it went down the track and met

(Testimony of Roy Ross.)

the railroad east, I believe it is approximately east there. The water went down the track, washed under the ties, washed out the track and washed out the—we had a gravity feed to a water tank there for the locomotive water, and it plugged it up, and, I believe, took out a section of that. I didn't see it, but the men were talking about that the tank, was, well, they said full of mud. Whether that was to the top or half full I don't know. They said the tank was full of mud, and they put a lot of it in a locomotive, I understood. I didn't see that.

Mr. Gearin: Mr. Ross, you are only to testify, not to what anybody told you or what you didn't see, only what you observed.

Q. Mr. Ross, where did this mud, brush, and rocks that you have described come from that got under this bridge?

A. It came from up above. That was where this fill was being put in across Mayflower Creek, where they was filling this fill, and this flash flood washed it down.

Q. Do you remember—I will say preliminarily, your Honor, the stations that Kuckenberg used from an engineering standpoint are different from the mileposts or stations of the railroad, and for that reason we had to correlate the two this [142] morning with the witnesses.

Q. Mr. Ross, do you recall, or did you check the maps this morning to find out where Station 699 was on our maps so that you could recall that point

(Testimony of Roy Ross.)

to your memory? Is that what they call "Big Cliff"?

A. That is "Big Cliff," 700, that is in the vicinity of "Big Cliff."

Q. So when we say "Big Cliff," why, everybody konws what we are talking about; is that right?

A. Yes, all the people up there know it, yes.

Q. What happened in "Big Cliff" when it fell on the track?

The Court: What date?

Mr. Gearin: April 9, 1948.

Q. Were you on the job in the spring of 1948? I believe you were, weren't you? It was April 9, your Honor, at Station 699.

The Court: I have it.

Q. (By Mr. Gearin): Do you recall what happened there?

A. They put some dirt on the track with tractors, piled it up there, and I don't know how deep it was for rail protection, but if I remember right it was six rails on the outside and five on the inside. At least there was 11 rails damaged in there and nearly all of the ties had to be replaced. We salvaged maybe one-fifth of the ties.

Q. What happened to cause the damage to ties and rails?

A. Oh, that was when they shot and the rock came down. [143]

The Court: Mr. Gearin, you may be right, but in Mr. Lind's summary he shows damage occurred on April 9th, then another damage on April 10th as a

(Testimony of Roy Ross.)

result of blasting, but if you recall his statement on April 9th, the one for which I believe claim is being made, he says on this particular date there was no work being done on this spot but part of the outside edge of the road fell onto the track.

Mr. Gearin: I'm going to ask him about that, your Honor.

Q. Do you recall any rock or material falling on the track at that place when they were not working on it?

A. They did have one slide there that slid out. I don't know how much rock there was, there was quite a bit of rock slid out on the track. Now, these dates, I haven't got my books, they were in—well, I don't know who has them. Maybe you know, but I don't know who has my books that I kept, but there was a day about that time, that might be just one day that I have told about the wrong day, but there was a day that the rocks slid down there from —just turned loose and slid down on the track.

Q. Had they been working up above prior to the time that that rock slid down?

A. Not at that time, not right at that——

Q. I mean, prior to that time, before that time, Mr. Ross, had they been working by blasting in through there and clearing off? A. Yes.

Q. Mr. Ross, do you recall what was done to the track prior [144] to the time they put the planking in? Were you there at that time they were putting the planking in?

(Testimony of Roy Ross.)

A. They were putting the planking in when I went there.

Q. What was the condition of the ties and the roadbed prior to the time that they put the planking in?

A. Before I went there the section crew was given——

Q. Well, now, you cannot testify to anything that you did not see, Mr. Ross.

A. That is right, I was not there.

Q. You were not there. Did you see any of the roadbed or ties before they put the planking down?

A. Yes.

Q. What was the condition of the roadbed and the ties that you did see before they covered them up with planking?

A. Well, I would say that the track was good for branch line track. It was a good branch line track.

Q. Do you recall where they had the area they called the detour? A. Yes, sir.

Q. What was the condition of the track after they had planked around the area away and after the operations had been carried on there? What effect did the operations have upon the track in the area of the detour? Did it have any effect at all, and if they had an effect tell the Judge what effect they had.

A. Well, wherever the rocks came down they would tear up the planking and sometimes they would break the ties, break the [145] rails, and

(Testimony of Roy Ross.)

they would have to be replaced. The rails would have to be replaced, and they would put new plank back in and haul more gravel back in there.

Q. Did you find any rotten ties there?

A. No, I don't recall that the ties were rotten.

Q. Were you there in April and May of 1949, Mr. Ross? A. No.

Q. Can you give us any idea of the number of rails that were broken or the number of ties that were broken during the course of these operations either on a daily, weekly, or monthly basis? Can you give us any idea at all?

A. It would come more often than—sometimes it would be, it would come more often than others. I don't know what the record shows, but over more than three thousand feet of rail were used, shipped to them for replacement rail while I was there, and when I left there was 62 rails that had been broke that had angle bars put on them. They had been broken in two and the angle bar put on to strengthen them at the break.

Mr. Gearin: I have nothing further.

Mr. Powers: I have no questions, your Honor.

Cross-Examination

By Mr. Denecke:

Q. Mr. Ross, at Sardine Creek there in October, 1947, or whenever that rail was repaired, you stated that you cut off a 16 and a half foot length there, and was the repair done under your [146] supervision? A. I was there, yes.

(Testimony of Roy Ross.)

Q. Well, was your purpose in being there to supervise the work of Kuckenberg's crew?

A. That is right.

Q. The car or cars that actually went off the track there, were derailed, they were about in the middle of a, quite a long string of cars; were they not?

A. I don't just remember whereabouts in the train they were, but they were not right on the front or they were not on, directly on the back of the train.

Q. About how many cars were in that train; do you recall? A. No, I do not.

Q. Fifty or seventy-five, would that be——?

A. Well, that I would say that that would be somewhere in that vicinity.

Q. Did you examine the flanges on the car or cars that were derailed? A. I looked at them.

Q. They were thin, were they not?

A. They were worn some.

Q. Were you actually at Mayflower Creek when the washout occurred, or did you come up there a little bit later? A. Later.

Q. You came up there a little bit later; is that correct? [147] A. Yes.

Q. Where were you ordinarily stationed, up there on the job or——

A. We had a shack built at Sardine Creek on the opposite side of the bridge from where the rock was.

Q. Did you stay up there during the day, during

(Testimony of Roy Ross.)

the working day? A. Yes.

Q. Either there or out on the job?

A. There or somewhere out on the job.

The Court: What date did that happen, Mr. Denecke?

Mr. Denecke: Which one, your Honor?

The Court: When the washout took place.

Mr. Denecke: January 8, 9 and 10, I think it is.

Mr. Gearin: Seven, 8, 9 and 10.

Mr. Denecke: Seven, 8, 9 and 10 on page 11, your Honor.

Mr. Gearin: May I make a suggestion, Mr. Denecke, to the Court, that you review the page previously, Mr. Lind's previous page of Mr. Lind's notes. He has some comments regarding the cause of the washout on the page immediately preceding it.

The Court: All right, you mean on January 8th, Mayflower Station 577?

Mr. Gearin: Well, if I can look at Mr. Denecke's copy, your Honor.

Mr. Denecke: I think he is talking about two different things there, your Honor.

Mr. Gearin: I am referring to item of January 8th, Mayflower [148] occurring about the middle of page 10.

The Court: Yes, that was at Station 577, I understand. Mr. Denecke, is that the same time that the culvert washed out Lucky Butte in that other case we had?

Mr. Denecke: No, your Honor, I think this is a

(Testimony of Roy Ross.)

little earlier, 1949-'50 I think, was the washout down there.

The Court: This does not seem to be very far from Lucky Butte River.

Mr. Denecke: Well, your Honor, the Lucky Butte is fed by the Coast Range. This is fed by the Cascades.

Q. Mr. Ross, how often is it necessary to service a track such as this particular track with the kind of traffic that runs over it? By servicing, I am talking about the maintenance work that you do.

A. Could I ask Mr. Clark how many men they had on that section up there?

Q. Certainly.

The Witness: How many men did they have, Don? I think he could tell you more about it when he gets up here if you let him tell it.

Q. As far as you were concerned, Mr. Ross, did you do any work on this section of track where Kuckenberg Construction Company was working, other than supervising the repair of damage?

A. That is all.

Q. Was there any other section crew or maintenance crew working [149] doing general maintenance on that section?

A. The crew from Detroit that is on east of there came down and worked from on the east end of it. That would be up around Mayflower, in that vicinity. The crew from Detroit was up three or four times and worked on that west end of it which is what we call Lakeside.

(Testimony of Roy Ross.)

Q. Were they aiding in the repair of the damage, helping——?

A. They were doing both. They did some normal maintenance, and they did some track damage repair. They had the extra gang over from Albany to help in there at the Big Cliff. When that big damage was did there, and I don't know how many times they had them when I was not there, but while I was there they did call them.

Mr. Denecke: That is all, your Honor.

Mr. Gearin: That is all.

Mr. Powers: No questions.

(Witness excused.) [150]

JOHN E. CLARK

a witness produced in behalf of defendant Southern Pacific Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Clark, what work do you do?

A. Track work.

Q. For—— A. Southern Pacific.

Q. How long have you worked for that company? A. Since 1928.

Q. Would you be acquainted with the project we have been talking about since yesterday afternoon? A. Yes, part of it.

Q. What times were you there?

(Testimony of John E. Clark.)

A. Well, I was there at all times whenever——

Q. Well, I mean, what times? When did you start to work on that job and when did you leave?

A. Oh, I was there at the first of it, from the first.

Q. When they first started the job?

A. Outside of when I was hurt, yes.

Q. Then I understand that you were hurt, you got your leg broken up there?

A. January 20, yes.

Q. 1948? [151] A. 1948, yes.

Q. How long were you off then?

A. Well, I don't know, I don't remember just how long it was. It was sometime in June when I was struck, latter part of June, somewhere around there.

Q. How long did you stay on the job?

A. Until they quit the train.

Q. Do you recall the Sardine Creek derailment?

A. Yes.

Q. Will you tell us what you know about that?

A. Well, we started down through with the train, was going to go—was going on through with the pick-up.

Q. Why did you use the pick-up, Mr. Clark?

A. Well, the flanges so full of dirt that we couldn't get a motor car down through there.

Q. Whose pick-up did you use?

A. Mr. Ross'.

Q. Go ahead.

A. Well, we went—it is crooked up there, and

(Testimony of John E. Clark.)

we were not staying, getting far ahead. When we would come up on the sharp bends we ran ahead then so that we would not be too close. We got around Sardine Creek, a right-hand curve. We went down the next left-hand curve, stopped and waited, and they didn't show up on this other one, so we went back to see them and found them off the track. [152]

Q. In the vicinity of where they went off the track what is the fact as to what was the condition or prior history of that track in that section prior to the time that they went off; anything happen before there?

A. Well, they had broken quite a few rails, yes.

Q. When you say they broke rails, do you know who we were are talking about?

A. Well, the contractor, Kuckenberg Construction Company.

Q. Did they have their equipment over a stretch of track in through there? A. Yes.

Q. What kind of equipment would they have?

A. Well, they had their tractors over there, their bulldozers, trucks and shovels.

Q. What was the general condition of the track there at Sardine Creek, Mr. Clark, as to whether it was in good condition or not?

A. Well, it was not in too good a condition at that time, no.

Q. I see. Did you know anything about the repairs that had been done just previously to this derailment?

(Testimony of John E. Clark.)

A. Well, outside of we put in some rail there, and we was out of rail, and we cut two rails in half and put them together with angle bars, put them in there.

Q. Did you have personal knowledge of splicing the rail there?

A. Well, I was not right there at the time it was spliced. I was on up above looking at something, and Mr. Ross was handling [153] that job at the time we put it together.

Q. Did you know where the splice had been performed? A. Oh, yes, I know where it was.

Q. Were was that point with reference to where that train went off the track?

A. Well, it was right at the time, right at it where the train went off.

Q. Let's see, you were hurt on January 20, you say? A. Twenty-second, I think it was.

Q. Do you remember this Mayflower Creek washout? A. Yes, I remember that.

Q. What do you know about that?

A. Well, when we got up there, why, the water was coming down there and pouring over the track and down the side of it and rock and mud in the openings.

Q. All right; now, what type of rock or mud was in the openings?

A. Well, it was that clay that we have up in there. I would say there was jagged rock probably the size of your head, as well as I remember.

Q. Could you see where they came from?

(Testimony of John E. Clark.)

A. Well, no, not exactly. They looked like they come from up in there off the highway. They looked like they had been shot, you know.

Q. What was directly above the creek from the bridge there at Mayflower Creek? Do you understand me? [154] A. Not hardly.

Q. Going up the creek from the bridge, had there been any construction work up there and, if so, what kind of work?

A. Well, yes, they was making a fill across Mayflower Creek.

Q. You say that this rock and everything got in the openings of the bridge?

A. That is the way it looked to me, yes.

Q. What happened to the water then, from the creek?

A. Well, the water from the creek went down over the track and down the sides and started washing it out.

Q. You were not there on April 9th. Do you recall this detour, and am I correct, Mr. Denecke, that the fifth item claimed against Southern Pacific, the reconditioning of the roadbed, April and May, 1949, $2600 item, refers only to the detour?

Mr. Denecke: That is correct.

Q. (By Mr. Gearin): Do you recall what they call the detour, Mr. Clark? A. Yes.

Q. All right, do you recall—do you know, or did you see the condition of the roadway there, the railroad right-of-way, before they put the planking in?

A. Yes, I was there.

(Testimony of John E. Clark.)

Q. What condition was it in?

A. Well, it was a good track, a 15-mile-an-hour track.

Q. I understand that you have got to have different type of [155] track for different type of trains and speed? A. Yes.

Q. What was the condition of the ties; were they rotted or good?

A. They were good ties for that type of track.

Q. What work, if any, had Southern Pacific done to the roadbed before they planked it?

A. Before they planked it the men went in through there and put in ties they figured that would not last much beyond the duration of the detour.

Q. When they constructed the detour I understand they planked it? A. Yes.

Q. What effect did the operations on the detour have upon the track itself, the roadbed, the ballast or ties, would you know about that?

A. Well, I would say that where they was doing their shooting it knocked it out in several places, and going up and down with the equipment would push it out of line.

Q. Did that have an effect upon the operation of the trains? A. Yes.

Q. Do you recall when the contractor, Kuckenberg, reconditioned the area of the detour?

A. I was there when they reconditioned the full area of it, just in places where the track had been shot out, about four or five places, I think it was.

(Testimony of John E. Clark.)

Q. When they got through would you say that the condition of [156] the track they had worked on was better than before, the same as before, or worse than before? A. Worse than before.

Mr. Gearin: You may inquire.

Mr. Powers: No questions.

Cross-Examination

By Mr. Denecke:

Q. Mr. Clark, were you familiar with the track maintenance in this area before construction of the road started? A. About 20 years of it.

Q. How many men were employed on the maintenance of this particular section? Now, I am talking about an area about four miles—how is described on your milepost? Do you know the town?

Mr. Gearin: Just a minute. I am going to ask my engineer about that.

(Discussion off the record between counsel.)

Mr. Gearin: It is by the mileposts, Mr. Denecke. You would have to get a map to tell you the mileposts.

The Witness: That is milepost 746 where the detour was built, just a little over. Milepost 748 is just beyond it.

Mr. Denecke: 746-748?

A. Just east of 746, just east of 748 where they went off the track of the detour.

Q. That particular area, Mr. Clark, prior to the

(Testimony of John E. Clark.)

time that the construction, when the detour was put down, how many men were [157] employed by the Southern Pacific in maintaining that track?

A. Four, that is, four on that section.

Q. What was their job, replacing ties, putting in more ballast, straightening rails; does that about describe it?

A. Well, they didn't do much rail straightening.

Q. I am talking about that road work.

A. Well, just what we call general maintenance, raising it up, putting in ties, general track work such as straightening bolts.

The Court: How many miles of track did they have under their supervision and jurisdiction?

Mr. Gearin: You mean this section?

The Court: Those four men.

Mr. Gearin: They went from 746 to 750.

The Court: How many miles is that?

The Witness: That would be about 16 miles, wouldn't it?

The Court: Sixteen miles?

The Witness: Yes.

The Court: Four men took care of 16 miles?

The Witness: Four men and the foreman.

Mr. Denecke: 746 to where? I did not catch that.

A. 750. That was the entire section.

Q. (By Mr. Denecke): Isn't that four miles?

A. No, that is this whole section. You see, we have our tracks going in sections, and this is what we call the Detroit section, [158] 118, that went from 736 to 750.

(Testimony of John E. Clark.)

Q. 736?

A. 736. Did I say 46? I meant 36.

Q. Well, then, that would be 14 miles, wouldn't it? A. Yes, 14.

Q. During the time, after the construction started the only work done by you and Mr. Ross was aiding the Kuckenberg crews in repairing damage; is that correct?

A. Well, yes, I used to go up through there and do some little work like straightening some bolts or something like that, at times when I would see something loose, and throw out rocks, something like that, if there was a few rocks in the track.

Q. Do you remember how many years the detour was on the road—or the planking, the plank detour is what I am talking about.

A. Well, it was put in there in the fall of 1947, I guess, and is still in there as far as I know.

Q. Put in in the fall or summer of 1947?

A. I think it was 1947, I think is what it was.

Q. How long was it used, approximately?

A. I don't know. I think they went off there in the spring of 1948, wasn't it? I don't remember now. I couldn't say.

Q. About a year and a half; was it not?

A. I would imagine something like that. I would not say for sure.

Q. Was there just one crew, or wasn't there two crews that took [159] care of this so-called Detroit section before the work started, before the road work started?

(Testimony of John E. Clark.)

A. Well, there was another crew that went on from 36 on down, yes.

Q. But there was just the one crew between mileposts 736 and 750? A. Yes.

Q. Did you work on the crew prior, on the Detroit crew?

A. No, I worked on the crew below, but we went back and forth along there.

Q. About how many ties per month would you replace? I am talking about before the road work started.

A. One crew? Well, we figure on about 10 ties to the man in eight hours.

Q. I mean, how many would you normally replace in a day or week?

A. Thirty ties or 40; four men, 30 or 40 ties a day. Of course, that depends a lot on where they go in.

The Court: He does not understand, I do not think.

Mr. Denecke: I am talking about before the road work started. Every day would you replace 30 or 40 ties?

The Witness: Oh, no, not every day.

Q. That is what I am asking, Mr. Clark, so take any period you went to work a month, and I am talking about before the road work started, about how many ties would you usually replace?

A. Well, that is a pretty hard question to answer because sometimes we do not put in any. Lots of

(Testimony of John E. Clark.)

times we don't just [160] go out and put in ties all the time.

Q. Say in a month, about how many ties on the average would you replace?

A. Oh, say, a hundred, from 50 to a hundred.

Q. How about rails? On the average, about how many rails would you replace in a month?

A. Oh, gosh, we would not replace a rail every couple years, three years.

Q. How about ballast?

A. Well, not too much ballast. They went through there during the war. That track was all put up in ballast during the war. We did not have to do it any more.

Q. What other type of track maintenance work did you do there before the road work started? You said you replaced ties and rail every once in awhile. What else did you do?

A. Well, just tightening bolts once in awhile, you know, and go along, sometimes, why, when the train keeps going around these curves, you know, just keep crowding and they will make the gauge wider, and we will pull it back into place.

Q. On the Sardine Creek derailment there did you examine the flanges on the trucks of the car or cars that were derailed?

A. Yes, I examined them, but as far as that goes, I am not a car man, I am a track man.

Q. I see. They were worn some, thin?

A. They were worn some, but the car man, I saw

(Testimony of John E. Clark.)

him putting [161] the gauge on, and it was all right yet, although they were worn some.

Q. Ordinarily, did you use a pick-up taking the trains through the detour there? A. Yes.

Mr. Denecke: That is all, your Honor.

Redirect Examination

By Mr. Gearin:

Q. Mr. Clark, while you were there any occasions when the S.P. crews would come up and do work?

A. Yes, we had the Detroit gang there, I think once, and I think I had the Mill City section gang there once or twice, the Mill City section gang was there.

Mr. Gearin: That is all.

(Discussion off the record.)

The Court: Now, does this complete the testimony on the question of what happened on the field, in other words, the testimony on accident or lack of accident except for one additional witness of Mr. Powers from the Bureau of Roads?

Mr. Powers: Either that or I might put Mr. Krill on, and I would introduce the contract in evidence, which would be of some help to your Honor, to see what was anticipated by the contract. If there was no objection, I would offer that in evidence now.

The Court: All right. [162]

(Discussion off the record between Court and counsel.)

Mr. Gearin: Your Honor, may I direct one inquiry to the Court? With respect to the counterclaim of Southern Pacific Company as the only thing we have established, so far attempted to establish the fact that certain materials were furnished and certain work performed by Southern Pacific Company, it is my understanding that the question of that will be reserved and that there will not be necessity for any more testimony and that your Honor only wishes to hear what happened out in the field.

The Court: Yes, if you have a witness from San Francisco who can testify as to the damage or value, and if you have some witnesses from Eugene and if the testimony is not very long, we will hear that.

(Further discussion off the record.)

The Court: We will recess.

(Noon recess taken.) [163]

Afternoon Session—2:00 P.M.

(Trial resumed.)

The Court: Mr. Powers, do you have your additional witness here?

Mr. Powers: No, he is not here, and the witnesses from San Francisco, they get up in this territory frequently anyway, and it is part of their territory, and they like very much to come to Ore-

gon, so I am not going to call them at this time, so we will rest at that. [164]

WENDELL C. STRUBLE

recalled for rebuttal testimony, testified as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Struble, I would like to call your attention to what happened at Station 699. This was on April 9th. The evidence, at least there has been some evidence that a portion of the old road fell on the track there. Did you see this dirt on the track?

A. Well, I couldn't recall the dates any more, but I do recall that about that station there was a portion of the railroad cut, that is the back slope on the railroad cut, that slipped in on the railroad track.

Q. That was about this time; is that correct?

A. Well, I couldn't—it has been five years since I have looked at those things.

Q. Did you observe those with Mr. Lind?

A. Yes, I looked at it, yes.

Q. Did you know where the debris came from that was on the track there?

A. Oh, yes, it definitely came from the side of the railroad cut, a vertical rock cut that—well, you could see where it slipped off.

Q. Do you know at the time that it slipped whether or not any work was being done in that vicinity by the Kuckenberg crews? [165]

(Testimony of Wendell C. Struble.)

A. Well, I don't just recall what time of the day it slipped, but there had been work in progress immediately above it. I mean we were completing the roadway cut above there and had done work, blasting above, but I don't—I think it came down during the night or early morning, and I do not think the equipment was working.

Q. Was there any vehicular traffic on the road above it there early in the morning or night?

A. No, nothing but construction traffic. The road was not open at that time to highway traffic. The highway traffic was routed on the railroad detour at that time.

Q. Are you in a position to say, Mr. Struble, whether or not in this particular area a train going by on the track there could cause a slide to occur?

A. Well, I do not think anybody could answer a question like that. I do not think—I think that would be impossible, to answer it.

Mr. Denecke: That is all, your Honor.

Cross-Examination

By Mr. Gearin:

Q. Mr. Struble, this slip on the cut that went on the track, there had been blasting in the immediate vicinity, had there not, sometime previously?

A. Immediately above it, yes, sir.

Q. Yes, and isn't it quite true that on occasions where you [166] have blasting on a point adjacent, that sometimes it does not take but very little vibra-

(Testimony of Wendell C. Struble.)

tion or even construction traffic to make a slide start to go or fall some place close by? Doesn't that happen quite frequently?

A. I don't say it happens too frequently below the grade. It happens more often above the area that you are working in.

Q. You could see where it could happen?

A. Nature can do lots of things.

Q. You cannot really say what the cause of that was, can you, Mr. Struble?

A. No, I do not think that—no, I don't know what definitely caused it.

Mr. Gearin: Thank you. That is all, sir.

Mr. Denecke: That is all.

The Court: Isn't it more reasonable to believe that—or is it more reasonable to believe that the falling earth or this slide was caused by the blasting than by the movement of trains below the point the slide occurred?

A. Well, I think it would be reasonable to assume that, yes.

Q. Assume what?

A. That it would be more reasonable to think that it was caused from blasting rather than train movement.

Q. What about natural causes had there been no blasting?

A. Well, I don't know. That railroad cut that we are talking about had been constructed for probably 25 or 30 years. I mean **[167] it was—I don't** know when the railroad was constructed, but many

(Testimony of Wendell C. Struble.)

years ago, and it has held up throughout that period.

Q. Is it reasonable to assume that if it held up for 25 years that it would have continued to hold up but for the blasting or some other incident of that kind?

A. That I couldn't answer. Nature does lots of funny things. We get slides sometimes where you never think you will get them, and, well, I just don't know. I couldn't answer that, but I do know that it came down.

I do know that we did have that slip off the side of the railroad cut that perhaps took one of the big shovels they had there, I think, the better part of two shifts to take it out, perhaps a couple thousand yards or in that—we didn't try to determine the volume because we decided we would not pay for it. We did not pay for it, so I don't know just what came down.

Q. Tell me what did you pay for and what didn't you pay for it, or how did you determine that?

A. Well, it was—it is just the way our department ruled. If the slide had come above our roadway, we would have paid it, but in that it developed below the area we were working in, we figured it was not our responsibility. That is the way we ruled.

Q. Does that mean that you ruled it was the responsibility of the Southern Pacific? [168]

A. No, sir, it is——

Q. Either the Government paid for it or the Southern Pacific would pay for it.

(Testimony of Wendell C. Struble.)

A. Well, in this case we perhaps ruled that the contractor paid for it because he took it out.

Q. Took what out?

A. He removed the material that slid down.

Q. Was he not obligated to remove that under his contract?

A. Well, he was obligated to keep the tracks of the Southern Pacific open to traffic, and that was an obstacle that had to be taken out before they could move trains.

Q. I think you do not have to determine whether the Government was right or wrong in not paying.

A. Well, we had some arguments about that with the contractors.

The Court: Are there any further questions?

Mr. Denecke: No further questions.

Mr. Gearin: No questions.

Mr. Powers: No.

The Court: That is all.

(Witness excused.) [169]

HENRY A. KUCKENBERG

called as a witness in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Kuckenberg, you are one of the plaintiffs in this case as one of the partners in the Kuckenberg Construction Company? A. I am.

(Testimony of Henry A. Kuckenberg.)

Q. How long have you been in the construction business?

Mr. Gearin: We will admit Mr. Kuckenberg's qualifications. He is an expert in the field of construction work.

Mr. Denecke: Will you answer the question, please?

A. I have been in business for myself since 1922.

Q. Prior to that time were you in the construction business? A. Yes, about, oh, six years.

Q. Have you had, either as someone else's employee or when you were in business for yourself, have you done work generally similiar in character to this work on the North Santiam?

A. Yes, yes, we have.

Q. What other general projects like that; name one or two of them, would you?

A. Well, we have had hundreds of jobs all over Oregon, Washington, and California. [170]

Q. I was thinking particularly of jobs similar in nature to this.

A. Well, we had a job just two years previous to taking on these four contracts just west of A, let's see, A4-2—no, just west of the first of the four contracts.

Q. That was for the State of Oregon?

A. That was a state contract, yes.

Q. That involved the relocation of the highway around a dam and a reservoir, did it?

A. Well, it was west of the dam. It would be

(Testimony of Henry A. Kuckenberg.)

possibly, oh, four miles west of the dam where this other road is located.

Q. Was the terrain in that area where you worked for the state generally similar to the terrain where this A24, A2 was?

A. Well, generally speaking it was. Some parts of it, some parts of that contract was not quite as restricted as far as the canyon is concerned, but the terrain is practically similar as far as the nature of the material.

Q. Did you inspect this scene of this work prior to the time that you submitted your bid?

A. Yes, we did.

Q. About how often or how many times did you inspect it?

A. I think I was down there twice before we bid it, on two different occasions. One time I think I was down there two days and the other time possibly one day.

Q. Did you OK, inspect and approve the bid that was put in [171] by your concern?

A. Well, we have engineers. Mr. Lind was our general superintendent on that job, and between Mr. Lind and our engineers and myself the bid was made up, and I think it is customary, and I think I did OK the final figures, yes.

Q. This job was bid when; do you recall?

A. Well, as I recall it, it was in February of 1947.

Q. When was the contract let, if you recall?

A. I think it was either April or May. Now, it

(Testimony of Henry A. Kuckenberg.)

took a little longer than normal to let this contract. As I understood it, the funds were not available at the time that the contract was let, and there was quite a bit of correspondence, as I understood it now, between the Bureau here and Washington getting the authorization to let the contracts.

Q. Did you do anything about procuring insurance on your operation of this particular job?

Mr. Powers: We will object to that. That does not go into the question of accidents, your Honor.

Mr. Denecke: It does not do what?

Mr. Powers: It does not go into the question of accident. We have closed our case on the basis we are trying out whether these matters were accidental in nature.

The Court: I suggested a little while ago that Mr. Denecke bring up the rest of his witnesses on this question, and I think he is producing Mr. Kuckenberg and the insurance man [172] at my suggestion.

Mr. Denecke: That is correct, your Honor.

The Court: And that is the reason why I asked you to produce the two men that you have here.

It seems to me that we are not going to be able to determine the scope of the insurance, as to whether or not this is an act within the meaning of the policy, unless and until we find out whether or not the word "accident" as contained in the policy means the very thing about which they are talking. I mentioned earlier that from the legal point of view whatever Mr. Kuckenberg and the

(Testimony of Henry A. Kuckenberg.)

agent for the, or the broker for the Hartford may have agreed upon may be immaterial as far as the determination of this lawsuit is concerned, but I do not want to prejudge that. I want to see what they have to say about it.

Mr. Powers: Well, the two people that actually were on this, if it was a question of interpreting the policy of what an accident is, an occurrence is, we have deliberately kept from bringing two people up from San Francisco. We talked to them this noon, told them until this accident came up, why, they would not come up. These men are something else. Mr. Krill is a claims man and that sort of thing, so we are here on the accident, and I didn't understand this earlier business about it.

The Court: I thought you told me earlier that you had a man in Idaho? [173]

Mr. Powers: We have a man in Idaho that talked with Mr. Lind. It was the man, Mr. Forbes, engineer down at the job. We didn't bring him here because it had something to do with the policy, you see. He was not there, and when you mentioned what you have said here about the accident, that it was a matter of repeated occurrences, 59, see, we have devoted our testimony——

The Court: Is that a man from Idaho?

Mr. Powers: The man from Idaho was down on the job and had talked to Mr. Lind one time.

The Court: I am not interested in that.

Mr. Powers: Yes. Then in addition to that we have two witnesses that we have had going to fly

(Testimony of Henry A. Kuckenberg.)

up, if need be, if we were going into the difference between occurrence and accident. It is a legal interpretation because courts have construed these things, and when we started the cases it was my understanding that, by stipulation of counsel, unless this was an accident no recovery can be had. They have repeatedly stated it in open court, so we have not gone in, and I am not prepared to go into this particular question at this time, your Honor. In other words, if it were held to be not an accident, then there just would not be any lawsuit, as I see it, and I think they have agreed to that.

The Court: What is an accident within the meaning of the policy? [174]

Mr. Powers: Well, the courts have placed a very—they have placed definitions upon occurrence and accident. That is what I thought I would furnish your Honor, a brief on the law on whether these policies have been up and been determined and been considered by the courts before as to what constitutes accidents. We have brought in all the evidence we had that is available as to what went on down there, and we thought from that that the Court could determine whether it was an accident, that these things constituted accident, or whether they were mere occurrences which were reasonably foreseeable. That, I think, is the test laid down.

The Court: Well, I may have misled you on that, but during the year and a half that this case has been before me I have heard a lot of statements. Among the statements that were made was

(Testimony of Henry A. Kuckenberg.)

one that, I think, one of the officials of Jewett, Barton, Leavy & Kern wrote this policy, and I know that they are connected with the Hartford, or maybe they are brokers. Now, at one time I believe that it was the position of the plaintiff that the policy should be reformed. I do not know whether that contention has been abandoned or not.

Mr. Powers: I do not think it has been abandoned, but it has no significance if these were not accidents because there are several collateral questions about notice and that sort of thing, and then their understanding later about the type of policy it was, but, in any event, unless they [175] could show an accident here, why, there is just no liability. I think that is what we practically all agreed to, and that was the purpose, I think, in limiting it at this time to that question.

The Court: Well, I can see if the president of the Hartford made a deal with Mr. Kuckenberg and said, "We will regard these things as accidents," the Hartford would be bound by it.

Mr. Powers: They made no such contention as that.

The Court: Well, I do not know yet.

Mr. Powers: There is nothing in the Pretrial Order or no basis for that. The only basis for it was that they wanted the reformation of the policy, but even with the reformation they do not contend they could recover unless there was an accident.

The Court: Perhaps I have your contentions wrong. I understood that one of your contentions

(Testimony of Henry A. Kuckenberg.)

was the Mr. Kuckenberg and Jewett, Barton, Leavy & Kern entered into a contract in which it was agreed that the policy issued would cover the precise type of occurrence about which you have brought some evidence into court. Is that your contention?

Mr. Mautz: That is right.

Mr. Powers: That is not in the Pretrial.

Mr. Denecke: I do not know, your Honor, whether it goes so far as to cover whether there was an understanding on every specific kind of event that took place there. Our contention is, your Honor, that Mr. Kuckenberg and Mr. Leavy [176] here at the time the policy was written, that Mr. Leavy was studying, and I do not know whether anybody else from Hartford studied or not, this particular contract involved here, and on the basis of that issued and sold the insurance policy that is here involved and to protect against this particular kind of loss.

The Court: Well, I am going to overrule the objection and let the witness testify.

I might tell you that one of the principal reasons why I am letting him testify is that from what I have heard it does not look like an accident to me, and before I require Hartford to bring up their other men to testify on it I will see what kind of a case plaintiff can make out.

Mr. Denecke: Would you read that last question, please?

(Testimony of Henry A. Kuckenberg.)

(Last question read by the reporter: "Did you do anything about procuring insurance on your operation on this particular job?")

A. Yes, we did the job, and we took the specifications to Jewett, Barton, Leavy & Kern, or to Mr. Leavy, and asked him how much it would cost to write this particular insurance, and he studied—as a matter of fact, I think we left the proposal or specifications with Mr. Leavy there for several days. That is customary on every job that we bid of that character. We do that very thing.

Usually the insurance company study it over and go out on [177] the job and look over the hazards and then quote a price on it. Normally, we carry Public Liability and Property Damage for our contracts, but this contract required an additional policy. Now, we had the same policy and the same type of contract with the railroad on a state contract that we had. It just so happened that one of the other insurance companies wrote or had that insurance—I think it was Continental Casualty—and we had perhaps, oh, a half dozen or maybe eight accidental damages of the same character that we had on this contract, and the bills were submitted, and on that particular job the railroad company——

Mr. Powers: I object to what occurred on some other job. We have no way of checking that, your Honor. The policy might be different, and we just have no way of getting down to any specific proof

(Testimony of Henry A. Kuckenberg.)

or way of disproving a vague statement like that. It would have no bearing here.

The Court: Who wrote that other policy?

The Witness: The Continental Casualty.

The Court: Who is the broker?

The Witness: Tomassene.

The Court: Down at Jewett, Bartlett?

The Witness: No, Tomassene has his own office, but on this particular—on this job here Tomassene had half of the insurance, and Leavy had the other half on these four contracts, but the state job before that Tomassene wrote the bid bond and [178] wrote the insurance, and that was covered in Continental Casualty, but it was exactly the same type of contract with the railroad and the same type of bond was required.

The Court: Go ahead.

The Witness: And on that job, as I say, we had eight or ten accidents, accidental damages of the same nature and character that we had on our four Bureau of Public Roads contracts.

Q. (By Mr. Denecke): Was that damage to the railroad track and right-of-way, Mr. Kuckenberg?

A. Yes, damage to the railroad tracks, and the bills were submitted to the insurance company, and they were paid.

Mr. Powers: We will object to that, too, unless we see the policy. There is a variation in policies.

The Court: We are just getting the background here. Go ahead.

The Witness: We have always carried that in-

(Testimony of Henry A. Kuckenberg.)

surance, and there was no reason for us to feel that we would not be protected and covered on this particular job. The jobs are very much of the same character, and we spoke to Mr. Leavy about it. He was informed early in the work of the accidents, and I think around the first of the year or shortly thereafter the Hartford were talking then of canceling the insurance because they told me that they were going to face a big loss down there. Then I think—— [179]

Q. Who told you that, do you recall, Mr. Kuckenberg?

A. Well, I think Mr. Leavy told me that.

Q. Well, now, getting back——

Mr. Powers: Now, I will object to that.

The Court: Who were those that might have told him?

The Witness: Mr. Leavy told me that, and he is a special agent, and the attorney, in fact, for the Hartford. That I know.

Q. (By Mr. Denecke): Getting back to when this insurance that is involved here was first issued, had you dealt with Mr. Leavy or Jewett, Barton, Leavy & Kern prior to this time as far as your insurance was concerned?

A. No, that was the first job that they wrote for us, as far as I remember.

Q. Did you have any discussion with Mr. Leavy prior to the time this insurance was issued about the type of losses or what losses this particular policy would cover? A. Yes, I did.

(Testimony of Henry A. Kuckenberg.)

Mr. Powers: Just a moment, I will object to that on the basis that they are attempting now to change by parol evidence a written document which is not subject to change by these subsequent discussions and talks. He said he had his talk with Mr. Leavy afterwards, and the policy itself would provide otherwise. You cannot change, an agent cannot change the terms of his policy, and unless something is in writing he could not [180] go around and change the terms of his policy, so we object.

The Court: Was this a conversation after the policy?

Mr. Denecke: Prior to the issuance of the policy, your Honor.

Mr. Powers: His last discussion was subsequent. That is where I got the date.

The Court: Go ahead.

The Witness: Yes, I talked to Mr. Leavy prior to placing the business with him, told him what our experiences had been and how the other companies had handled it, and he told me that any accidental damage was covered by this policy.

Q. (By Mr. Denecke): Did you make any mention to Mr. Leavy of what sort of protection you wanted on this particular job by the insurance?

A. Yes, we wanted full protection for any accidental damage.

Q. Did you go into details as to that damage to the railroad or not?

A. Yes, we felt that we had ordinary insurance, both Liability and Property Damage, but this was

(Testimony of Henry A. Kuckenberg.)

a special policy to cover the damage to the railroad.

Q. There were two policies issued; were there not? A. Yes.

Q. One was to, naming your company, and the other was naming the Southern Pacific as the named assured?

A. I think that is correct. [181]

Q. You paid for both policies?

A. We paid for both policies.

Q. Did Mr. Leavy make any response to you—this is prior to the issuance of the policy—did he make any response to you? Did he make any statements to you as to the coverage of the policy naming—to you of the policy to be issued by Hartford, as far as its coverage for any damage to the railroad or railroad right-of-way?

Mr. Powers: Same objection. The policy speaks for itself. It cannot be varied by parol evidence.

The Court: Objection overruled.

The Witness: Well, he told me it would cover any damage to the railroad tracks, to their rolling stock, or any of the railroad property; that the policy would cover it.

Q. Was that the—was it your intention to procure——

Mr. Powers: Well, object now. You can ask the witness questions, but you are putting words in his mouth now, what his intention was. You can ask what was said.

Q. (By Mr. Denecke): Was it your intention, or what was your intention as to the type of cover-

(Testimony of Henry A. Kuckenberg.)

age that you intended to procure by this particular type of policy with reference to damage to the railroad?

A. Well, we wanted full protection for any damage that was sustained from our operations, to the railroad.

Q. You stated that Mr. Leavy had studied your contract with the Bureau of Public Roads? [182]

A. Yes.

Q. Prior to the issuance of the policy, or did Mr. Leavy at any time state to you that the policy that was issued to you would not cover damage to the railroad? A. No, he did not.

Mr. Gearin: I think that is a little leading, your Honor.

The Court: All right, he has answered it already.

Q. (By Mr. Denecke): Mr. Kuckenberg, you had occasion to go to this job many times, I take it, during its progress? A. Yes, I did.

Q. And are you personally familiar with some of the damage that occurred up there?

A. Yes, I am.

Q. On the basis of your experience in construction work, from blasting particularly, do falling rocks on occasions go some great length from the place that the blasting is done?

A. Yes, I have had rock landed, oh, sometimes, oh, 600 feet from where the blasting occurred, and we have had tremors go as far as a mile from the blasting.

Q. When rock was blasted in this particular

(Testimony of Henry A. Kuckenberg.)

area on the side of the slope there, where did the—or what happened to the great bulk of the rock?

A. Well, ordinarily good shooting, I would say you load your holes with just enough powder that you raise your rock or whatever you are shooting, just raise it up enough so that it [183] settles down and you do not lose too much from a shot of that type. You lose a few sometimes, but not too many.

Q. In blasting this particular operation, how did you plan to protect the railroad against damage? I don't mean by insurance or anything else, but physically, in the operation to protect the railroad from damage?

A. Well, we did everything that we could. We covered the track with sometimes as much as four feet of earth to protect it. We built barricades in other places, and other places we would doze up the path so that if rock came down it would stop when it hit this sort of wall that we would build up there with either earth or rock, and we used every precaution that we could to protect the railroad.

Q. This wall that you speak of——

A. Well, it was kind of a dike that we built up. We just dozed the path so that when the rock would come down it would stop. Some places we couldn't do that, but where we could do it we usually did that.

Q. Do you know from your own knowledge from your inspection of the job there, Mr. Kuckenberg,

(Testimony of Henry A. Kuckenberg.)

whether most of the rock coming down there did any damage to the railroad?

A. Well, most of it didn't. That is for certain. A percentage did. I think my statement would be the same as Mr. Lind's that possibly, oh, maybe a very small percentage of it would damage the [184] track.

Q. Mr. Kuckenberg, you have heard all the testimony here, and you know what the issue is concerning whether or not this occurred by accident. Is there anything else that you observed on the job that would be of any aid to the Court in determining that issue?

A. Well, as I have stated, we have carried this insurance for a good many years. We have had damage on railroads. We have had damage on houses from blasting, and the insurance company has always paid on a policy of this sort. This one particularly, as we understood it then and as we feel now, was written to protect any damage to the railroad. On this particular job I have seen rocks that—I have been driving along the railroad track on the detour and have seen rocks coming down the side of the hill, and we were not even working there, and certainly you couldn't figure anything like that happening before you bid a job, and definitely, in my estimation, that is an accidental damage if it comes down and damages something. We certainly didn't stir it up, but it is on our contract, and we are responsible for it, and if we are responsible for it the insurance company takes that

(Testimony of Henry A. Kuckenberg.)

liability off our hands, and that is the way we have always bid a contract, that they are simply taking that off our shoulders.

Mr. Denecke: That is all, your Honor.

The Court: All this testimony has come in subject to your objection. [185]

Mr. Powers: Thank you, your Honor.

Cross-Examination

By Mr. Powers:

Q. You stated in your discussion with Mr. Leavy that he was to issue a policy to cover accidental damage; is that correct?

A. Yes, damage to the railroad.

Q. Yes, accidental damage. A. Well——

Q. Do you maintain this is anything but accidental? A. It is all accidental damage, yes.

Q. That is what you are claiming?

A. Yes.

Mr. Powers: That is all.

Cross-Examination

By Mr. Gearin:

Q. Mr. Kuckenberg, your discussions with Mr. Stuart Leavy, senior partner of Jewett, Barton, Leavy and Kern, were to the effect that you were to obtain insurance to protect the Southern Pacific for all damage as required by your contract?

A. That's right, that's right.

Q. That is what you tried to do and attempted

(Testimony of Henry A. Kuckenberg.)

to do, was to get insurance which would pay Southern Pacific Company for all damage in any way occasioned by your activities?

A. Which is covered by our contract; that's right.

Q. That's right? [186] A. Yes.

Q. In other words, if something moved down and damaged the track, that is covered by insurance? A. That's right.

Q. You were bound by the contract with the Public Roads Administration to secure that type of coverage and insurance protection for the railroad? A. That is right.

Q. And that was the second policy that you obtained in order to—that bore the named insured, and names of the Southern Pacific Company and the Western Union Telegraph Company?

A. That's right. I think that is restricted, however, to our work and covered by the contract. That is, we are not responsible for damage that someone else causes.

Q. That is right, if somebody, some bystander throws a rock over the embankment and hits a brakeman down below, that is not liability on you?

A. That is right.

Mr. Gearin: I have no further questions.

Recross-Examination

By Mr. Powers:

Q. That same thing referred to accident, didn't it? A. I think the contract speaks for itself.

(Testimony of Henry A. Kuckenberg.)

Mr. Powers: Yes, I do, too. Thank you. That is all.

Mr. Denecke: That is all.

The Court: That is all.

(Witness excused.) [187]

HARRY M. WILLIAMSON

called in behalf of defendant Southern Pacific Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Williamson, what is your occupation?

A. At present I am Assistant Engineer of the maintenance of Southern Pacific Company.

Q. Is that confined to any one division?

A. I have the Pacific System of the Southern Pacific.

Q. Covering what states?

A. Covering Texas, New Mexico, Arizona, California——

The Court: All right, start in asking him the questions.

Q. (By Mr. Gearin): Are you a registered engineer? A. I am.

Q. For the State of Oregon? A. I am.

Q. Were you familiar with the operations which we have discussed here in the relocating of the highway? A. I was and am.

(Testimony of Harry M. Williamson.)

Q. What was your job at that time with Southern Pacific?

A. I was Assistant Division Engineer for the Portland Division Headquarters at Portland.

Q. During that period of time that the operations were being carried on did the Southern Pacific expend labor and materials [188] in connection with its traffic? A. On this job, yes, they did.

Q. For what purpose?

A. To correct damage that was done by the contractor in his activities on it.

Q. Was any labor and material expended or furnished for ordinary maintenance during the period of this work?

A. No, all the equipment, all the materials was furnished the contractor.

Q. Was there any ordinary maintenance carried on, and if not, why not?

A. Not in this detour area. The planking that was placed in there by the contractor at the outset precluded the possibility of what we term ordinary maintenance by that, going in and picking up a tie.

Q. What preparation, if any, was made for the job that was going to be done there in connection with relocation of the highway?

A. Prior to the planking of the railroad, why, our section forces went through and changed our ties that we considered would not last through the period of detouring, and serviced up the railroad so that it would stand a lack of maintenance for the anticipated period of detouring.

(Testimony of Harry M. Williamson.)

Q. How long would that track have, in its condition prior to planking, lasted with ordinary railroad use without being repaired, without any major repairs? [189]

A. Would you state that question again? I am sorry, I didn't get it.

Q. How long would that track have been able to hold up under ordinary use without any great repair work to do?

A. Well, with the normal operation we have up there it would probably go a couple years. They would probably have to take up a few joints, but generally speaking, it would not require any work to speak of.

Q. Were you familiar with the detour area?

A. Yes, I was.

Q. What was the effect of the operation of vehicular traffic on the track?

A. It was very severe upon the track for several reasons. The vehicular traffic, which consisted not only of automobiles, but very heavy commercial trucks hauling veneer and plywood from Idaho, they would traverse, and because of the rails being centered, why, it was necessary for the highway traffic to either straddle the rail on one side or the other which, of course, puts an unbalanced load on our tie structure and depressed our track on one side or the other, and we got what we considered in trainmen's terms very rough track. It was out of level, out of surface, and it was very rough.

(Testimony of Harry M. Williamson.)

Q. How would that compare, that type of use, with ordinary train use?

A. Well, it would be much greatly accelerated, the deterioration [190] of the track, because this vehicular traffic, these heavy loads of contractor's equipment occasionally go up it, his Tournapulls and dozers, and it affected the track structure a great deal more than the train.

Q. Mr. Williams, when tracks are prepared are they prepared for a centered load, on-center loading, even distribution between the ties or rails?

A. Oh, yes, the rails are centered on the ties. I mean the bearing surface is equally distributed.

Q. Were you familiar with the Sardine Creek derailment? Do you know about where and when it occurred?

A. Sure, I am familiar with that location.

Q. The river side is on which side of the track, high or the low side?

A. Well, it is on the inside of the curve. We speak of the low side of the curve as being the inside and the river would be on the low side of the curve.

Q. Were you familiar with the point of derailment?

A. Yes, the general location of it, yes.

Q. Mr. Williamson, assuming a derailment at the point of derailment on the low side of the track at a point where a joint was made, and assuming further that there was a thin flange of a truck of a car that was derailed, do you have an opinion

(Testimony of Harry M. Williamson.)

based upon your experience and training as to the cause of the derailment?

A. Well, from the testimony that was [191] offered——

Q. You have to answer that yes or no.

A. Yes, yes, I have an opinion.

Q. What is your opinion?

A. My opinion would be that the condition of the flange on the low rail which is a lapped, a lapped joint. A lapped joint in railroad terminology, the gauge side of the inside of the rail, it is not continuous. In other words, one rail is butted up against the other, and there is a horizontal lapping there, so if a flange would come along that was sharp or it was a flat contoured flange, would come up against the butt end of the rail and strike it, there would be a possibility or probability of derailment.

Q. Were you familiar with the condition of the track and the detour at Sardine Creek at the time of the derailment?

A. I was familiar with the—I was familiar with that in a general way, I can say.

Q. What was its condition?

A. It was very rough like the whole entire detour area.

Q. Did the condition of the detour at that point cause you any apprehension as to the safety of the trains?

A. Yes, we were quite concerned. As a matter of fact, we reduced the speed of our trains through

(Testimony of Harry M. Williamson.)

the area, one reason being—we reduced them from our normally bulletined operation speed of 15 miles an hour to eight, one reason being because of the condition of the track, and the second, of course, we were [192] apprehensive of rocks falling down in front of them. A lower speed would give them more time to stop.

Q. Do you have an opinion as to whether or not the condition of the track prior to the derailment—strike that—do you have knowledge of any track or steel rails being furnished Kuckenberg Construction Company for the repair work?

A. Yes, I do.

Q. Were those tracks or rails paid for?

A. No, sir; no, sir. There is three thousand feet, some three thousand feet, I think, we furnished the material.

Q. Were you familiar with this road prior to the time that the Kuckenberg interests came in there and started the highway relocation?

A. Yes, we had been operating up there for many years.

Q. What is the slide history in this area, Mr. Williamson? Do they have rocks, boulders, trees, stumps, on the roadway very often?

A. No, rather infrequently. Of course, in the previous winters we have had trees down, and we have had rocks down, but they were very infrequent. The line would probably be tied up on an average, maybe once or twice or three times during the winter season with a stump or tree, there might be

(Testimony of Harry M. Williamson.)

trees down that would cause trains to be delayed and have to change our rails at what we called the weathered line. We have it on our other branches where the line has been in existence like that [193] there for 40 or 50 years, and if the ground is not disturbed, why, it gradually stabilizes itself.

Q. Now, after this was over, and confining my question to the detour, what resurfacing or repair work did the contractor do with reference to the detour area?

A. Well, in compliance with the contract, Mr. Struble, myself, and Mr. Lind and our Road Master, Mr. Parker, went over the railroad in the detour area, and we pointed out to the contractor the locations where repairs would have to be made before we would give a release to the Bureau of Public Roads, before we accepted the railroad in the detour area to be turned back to us, and that in turn would release the Bureau to make payment.

We pointed those out to Mr. Lind, and the work was done in those specific locations, and they did not comprise a complete resurfacing or refinishing of the detour area. There was just isolated locations that damages would occur.

Q. When they completed resurfacing, what was the condition of the roadway with particular reference to the condition prior to the time the planks were put down?

A. Oh, it was much poorer condition than when they planked it.

(Testimony of Harry M. Williamson.)

Q. I understand that you accepted the resurfacing?

A. We accepted the resurfacing because at that time because of the construction of the dam there the United States Government was purchasing the railroad from us rather than relocate it for us because, of course, our railroad was right in the bottom of [194] the river. It would be inundated by the construction of the Detroit Dam anyway, and we knew that we would not have to operate over it for a very short time, and, consequently, we accepted that, and we were much more lenient in our acceptance of maintenance work that was done than we would be had we contemplated continuing operation.

Q. After the sale was completed did you ever operate up there again? A. No.

Q. Is there a particular reason for that?

A. Well, the railroad was in such shape that we would not want to continue operating up there unless considerable work was done to rehabilitate it.

Mr. Gearin: You may inquire.

Mr. Powers: No questions.

Cross-Examination

By Mr. Denecke:

Q. Ordinarily, Mr. Williamson, before the construction you had a regular crew that did the maintenance work on this section where the construction was as well as about 10 more miles of road?

A. Yes, we did, with headquarters at Detroit.

Q. There was no regular routine maintenance

(Testimony of Harry M. Williamson.)

done on this particular section where the detour was for between a year and a half and two years?

A. You are referring to the period during which it was planked? [195]

Q. That is right.

A. No, it could not be done because of the planking. You could not get under the track.

Mr. Denecke: That is all, your Honor.

The Court: That is all.

(Witness excused.)

The Court: We will take a recess.

(Afternoon recess taken.)

The Court: During the recess Mr. Struble called my attention to the fact that he made an error in computation and the difference between the low and the next to the lowest bid was not $70,000 but somewhere around $20,000, a very narrow difference between the two. [196]

J. STUART LEAVY

a witness produced in behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Leavy, you have been in the general insurance business in Portland, Oregon, for quite a number of years; have you not? A. Yes.

(Testimony of J. Stuart Leavy.)

Q. You are a partner in Jewett, Barton, Leavy & Kern? A. Yes.

Q. What is your official relationship to Hartford Accident and Indemnity?

A. The firm of Jewett, Barton, Leavy & Kern are agents of Hartford Accident and Indemnity Company.

Q. Can you explain what sort of agents you are for them? Is that a general agency?

A. Well, we are called as having a general agency contract. Actually, we are more strictly a local agency.

Q. How long have you so represented Hartford?

A. Well, the agency has represented them since 1914, I think, or 1915.

Q. Do you still represent Hartford?

A. Yes.

Q. The Agency? A. Yes. [197]

Q. In the winter, the early winter, the early months of 1947 did you have occasion—you did have occasion to discuss with Mr. Henry Kuckenberg regarding insurance for the work that he hoped to get on the North Santiam?

A. Yes, I was hesitating because I couldn't remember whether it was fall or spring.

Q. His testimony was that he bid the job in February of 1947? A. Yes.

Q. If you have any question about these dates, Mr. Leavy, just ask. We have had a lot of testimony, and I think we have pretty well agreed on the dates.

(Testimony of J. Stuart Leavy.)

Mr. Kuckenberg gave you the bid proposal and specifications for this particular contract?

A. Yes.

Q. Did he ask you then to provide him with the insurance necessary to cover him against——

Mr. Powers: Why don't you ask the witness what he asked him? You are leading him.

The Court: Oh, he understands this business. You can ask him any questions.

Mr. Powers: Well, he can say it. I don't think he actually knows what was there—Mr. Leavy can tell you.

Q. (By Mr. Denecke): Mr. Leavy, would you tell us what occurred then?

A. Well, we solicited Kuckenberg Construction Company for their [197-a] business and also the contract bond that came up. They already had a blanket Public Liability and Property Damage policy, and that expired in April, and I solicited Mr. Kuckenberg for that particular coverage which was a blanket Liability and Property Damage, and that policy came into effect, I think, in April of 1947, so we pointed out—sales propaganda—some of the deficiencies of his present policy and showed him how much broader our contract was and more favorable, and we persuaded him to switch his insurance from the Continental Casualty Company to us, which we placed in the Hartford.

Q. Now, was there a discussion between you and Mr. Kuckenberg as to the, his liability for damage to the railroad and the railroad right of way

(Testimony of J. Stuart Leavy.)

on this North Santiam job?

A. Well, yes, there was a discussion, but I cannot recite that in too great particular because it was rather involved.

We had to write a policy for the Kuckenberg Construction Company which would cover them against injury to persons and damage to property of others, and the contract, as I remember, also included damage to the railroad company, and that the railroad company would require a policy to be written in their name known as a railroad protective policy. So we issued two policies. We issued one in the name of the Kuckenberg Construction Company, which was a blanket Liability and Property damage. Then we issued a railroad protective policy in the name of the Southern Pacific, and that took care of—the [198] railroad policy was presumed at least to take care of the contractual or any claims that would be brought against Southern Pacific arising out of Kuckenberg Construction Company's activities.

The Court: What was the name of that second policy, a railroad what?

The Witness: Protective contingent.

The Court: A railroad protective contingent policy?

The Witness: Well, they used two terms, your Honor. They sometimes call it contingent policy; sometimes call it protective.

The Court: Tell us what that second policy did.

(Testimony of J. Stuart Leavy.)

The Witness: The second policy?

Mr. Denecke: Excuse me. Would you like to see the policy, Mr. Leavy? You probably have not seen it.

The Court: Oh, he has seen it.

The Witness: The second policy would protect the Southern Pacific Company in case any claimant presented claim for damage to their property or their person arising out of operations of Kuckenberg Construction Company.

The Court: Ask him the main question now. Did that protect the Kuckenberg—did it protect the Southern Pacific from the activities of Kuckenberg? In other words, if Kuckenberg damaged the property of the Southern Pacific, did Southern Pacific have any right of action against the insurance company?

The Witness: Well, they might construe it that way because [199] they drew the endorsement that went on the policy. I doubt it, but the insurance which would protect the Kuckenberg Construction Company for damage to the railroad was a policy that we wrote in the name of Kuckenberg Construction Company covering their liability for any damage that they did to the property of others.

Q. (By Mr. Denecke): Mr. Leavey, the words "accidental damage" and "operational damage" have come up here, and you, of course, in your experience have dealt with them probably many times. Would you state to the Court what your purpose was in writing this particular policy with

(Testimony of J. Stuart Leavy.)

regard to what coverage you gave and what coverage you did not intend to give Kuckenberg Construction Company?

Mr. Powers: Well, that would change——

Mr. Denecke: Distinguish between operational and accidental, and I am referring now to the policy naming Kuckenberg as the insured.

Mr. Powers: That would be changing the terms of the written policy, your Honor.

The Court: What is your binding authority for Hartford?

The Witness: Well, the binding authority for the—becomes by virtue of our agency agreement and as is implied under the license, and applied under their license, rather.

The Court: You can bind the company up to a hundred thousand or more—I don't know what the limit of your binding policy is—on standard policies that they issue; is that correct? [200]

The Witness: I assume so.

The Court: Do you have any binding authority on unusual types of policy?

The Witness: Well, we cannot bind on a contract bond.

The Court: You cannot?

The Witness: No.

The Court: Prior to the time that you issued this policy for Kuckenberg, did you consult with some of the officers of the Hartford to explain the problem and get additional authority?

A. Well, I don't recall, I think I consulted with

(Testimony of J. Stuart Leavy.)

them about the rate on it, and we made special rates for the contract, and I also consulted with them on the railroad policy before we issued it, the railroad protective, but in the writing of the blanket public liability and property damage for the Kuckenberg Construction Company we had underwriting authority to issue the policy of that type if there was not anything unusual in it.

The Court: Are there any contract provisions in the blanket public liability and property damage policy that you issued to Kuckenberg?

The Witness: I didn't understand you, your Honor.

The Court: Did you have any contract provisions? Did you protect them, Kuckenberg, for liability assumed by contract?

The Witness: Well, as set out in the policy, it defines contractual liability for leases, spurs, and easements.

The Court: I am not getting it. Perhaps you had better take [201] over the cross-examination.

The Witness: I am sorry, I do not mean to be evasive.

Q. (By Mr. Denecke): Well, as I understood it, if I may lead you a little bit, Mr. Leavy, your last answer there, you covered the contractual liability of Kuckenberg if it was due to an easement, spur track agreement, and I forget what the third was. A. Leases.

Q. Leases. Would you, Mr. Leavy, explain to the Court the way in which, when you wrote up this

(Testimony of J. Stuart Leavy.)

policy insuring Kuckenberg as the named insured, your intention as to what would be covered under the policy and what would be considered operational?

A. Well, we covered first of all bodily injury, and the insuring clause in the policy, which is standard, recites reference to bodily injuries as resulting from an accident, and we eliminate the term "by accident," which the insurance clause puts it in on an occurrence basis.

On the property damage, that is damage to property of others which occurs through accidental injury. It must be something unexpected, not anticipated at the time the event occurs which caused this unexpected or accidental injury.

The Court: Accidental injury?

The Witness: Accidental damage, I mean. Pardon me.

Q. (By Mr. Denecke): You are familiar, at least generally, with this particular construction job of Mr. Kuckenberg's? [202] A. Yes.

Q. Could you illustrate to the Court, and you can make up these illustrations, Mr. Leavy, as to what were considered or what you, at the time you issued this policy, would consider accidental and what you would consider operational.

Mr. Powers: Well, I do not think that is anything for Mr. Leavy to consider. That is a matter for the Court to conclude now from all the testimony here.

(Testimony of J. Stuart Leavy.)

Mr. Mautz: This is also preliminary to some further testimony by Mr. Leavy, your Honor, and from an officer of the Hartford. I think it will be connected up.

Mr. Powers: Well, he is certainly infringing upon the fact-finding authority of the Court here in this matter.

The Court: Mr. Leavy testified that he already had authority from Hartford to issue their standard policy. He had no authority to deviate from those policies. In fact, he has testified he had no authority to write a policy which assumes contract liability without specific authorizations from the company; is that right, Mr. Leavy?

The Witness: Yes.

The Court: Unless the law provides for fire insurance policies the same as it does for life policies, that the agent of the company is the agent for all purposes, I do not see how Mr. Leavy's interpretation of the policy coverage could enlarge the obligations of the company. [203]

In the first place, let me ask the question. On fire policies is the agent of the company the agent for all purposes? Is there a similar provision with reference to fire policies as there is in connection with life policies?

Mr. Denecke: Your Honor, I think I can answer that generally, that the statements or representations of an agent under a fire policy are held binding upon the insurer despite the fact that the

(Testimony of J. Stuart Leavy.)

fire insurance policy says that that is not so right in the policy.

The Court: Did you plead waiver or estoppel here?

Mr. Powers: Yes——

The Court: You plead waiver?

Mr. Powers: I plead waiver or estoppel as defense to some things that they were claiming.

The Court: Yes, before they came in.

Mr. Powers: That is right.

The Court: What about that Lindstrom case in Oregon which says that you must plead and show waiver? That was a fire policy. Are you acquainted with that case, Mr. Denecke?

Mr. Denecke: Not by name, your Honor, no, I am not.

The Court: I think they went up on a pleading problem, and they held that you could not invoke the doctrine of estoppel, and it had to be done on the basis of waiver, but I am going to let Mr. Leavy testify. He is here, and you ask him any questions you want. [204]

Mr. Denecke: Would you read the last question, please?

(Last question read by the reporter: "Could you illustrate to the Court, and you can make up these illustrations, Mr. Leavy, as to what you considered or what you at the time you issued this policy would consider accidental and what you would consider operational?")

(Testimony of J. Stuart Leavy.)

Mr. Powers: May we have an exception to that?

The Court: Yes.

The Witness: Well, an operational accident would take not only damage but the A—if the face of a cliff would have to be shot off and there was no place for the rock to go except down on a railroad track, that would be operational, and as far as the damage was concerned not acidental, because it was inevitable.

In contrast to that, an operation on the side of a hill or a place that got out of hand and blew trees or rocks clear beyond the comprehension of a proven contractor would be accidental.

The Court: I think you ought to tie it down to the facts of this case, Mr. Denecke.

Q. (By Mr. Denecke): Mr. Leavy, take this illustration, that it was at a place where it was known that rock was going to fall on the track, and protective covering was put on the track, and it was reasonably expected that that protective covering would protect the track from any damage. There was blasting done, and there was an overshot or, in other words, a lot more rock in a [205] lot larger pieces of rock came down on the track than had been reasonably expected and that, despite the protective covering, that caused damage to the track. We will assume that this is through a place where the contractor reasonably thought that the protective covering would have been ample to save the track and right of way from any damage. Now, in that

(Testimony of J. Stuart Leavy.)

particular instance would you define that as accidental or operational?

A. Well, I don't know, that is a matter of an opinion going out and looking at it. It might well be construed as an accident if it went clear beyond what he ever anticipated on the thing, but that is a matter of interpretation. I might agree to that, and the company would say something else.

The Court: Well, Mr. Leavy, in addition to what Mr. Denecke told you, assume further that every fifth time that they put the covering over the track damage happened that they did not anticipate, and assume further that in an area of 500 feet in length over a period of four or five months damage was caused beyond what they expected 59 times. Would you consider that each of those 59 occurrences was an accident within the meaning of the policy?

The Witness: If it was beyond their expectations or that which the contractor ordinarily would expect.

We have those cases come up quite frequently in connection with blasting, and our contractor puts a blast in where he thinks it is going to react within a certain area, and it goes [206] beyond that, and it shakes down plaster and homes and so forth, and then we have property damage claims which we pay.

The Court: Third parties?

The Witness: Third parties.

The Court: In this particular case the assured was Kuckenberg who was under a contract with the

(Testimony of J. Stuart Leavy.)

Southern Pacific. Would that make any difference?

The Witness: No, we would not assume to insure any contractor against a loss where you know it is going—I mean, where it is inevitable. There has to be an element of accident in it.

The Court: Well, I still do not understand your answer.

Would it cover the Southern Pacific then if Kuckenberg was under contract with Southern Pacific to do this work?

The Witness: If there was an accident, your Honor, yes.

The Court: Let me try once again.

The Witness: I am afraid you got a dumb witness on your hands.

The Court: No, no. Kuckenberg agress to build a road for the State Highway Commission or Bureau of Roads, and in connection with the construction a considerable amount of blasting has to be done. Southern Pacific owns some right of way on which they have some tracks immediately below the place where they are going to be blasting. Kuckenberg enters into a contract by which it agrees to protect the property of the Southern Pacific and restore it to the condition in which it was prior to any accidents [207] that might occur or any damage that might result from its blasting. The insurance is obtained, one of blanket public liability and property damage policy which has a contract liability provision.

Where the damage occurs with great frequency

(Testimony of J. Stuart Leavy.)

or considerable frequency, would the policy of insurance, the blanket public liability and property damage insurance covering Kuckenberg as an assured, protect it against claims asserted by the railroad company?

The Witness: I would not consider that the frequency had anything to do with it. It would be how has it occurred, whether it was an accident or not, and if the insurance company would stay on the risk long enough you could have 50 accidents or you could have 50 damages which were not accidents, but the operational, that is the inevitable result in there, but because it occurred in one case and because it occurred in ten I do not, in my humble opinion, think that is the test. I think that is how the accident happened or how the event happened, whether it was accidental or whether it was operational.

The Court: It is your statement that at the time you wrote this policy, if Kuckenberg in its operations could not reasonably anticipate the amount of damage that resulted from a blast, under those circumstances the damage cost would be accidental and covered by the policy? [208]

A. Yes, with those——

The Court: Go ahead.

Q. (By Mr. Denecke): Mr. Leavy, did you go up to the job after it was in progress there and after your policy was issued? A. Yes.

Q. Do you recall what the occasion was for your going up there?

(Testimony of J. Stuart Leavy.)

A. Oh, I went as a matter of interest first as underwriting and also in an interest in the contractor's work. Then I went up to see the progress of the work, I think, about three times altogether. I think I made one or two trips with Mr. Krill up there when we had a report of an accident up there, as I recall, a track accident on one occasion.

Q. Did you have any knowledge of damage to the railroad property? A. Yes.

Q. On the anniversary date of this policy which would be in April if April was the—was, that it commenced in April, do you recall any discussion that you had with Hartford Accident and Indemnity regarding the renewal of this policy?

A. Yes.

Q. Do you remember with whom that was?

A. Well, at first we received instructions not to renew the policy, and then later I went to San Francisco and talked with Mr. Posey and Mr. Robinson.

Q. Who are Mr. Posey and Mr. Robinson? [209]

A. Mr. Robinson is the superintendent of the Liability Department of the Hartford, and Mr. Posey is a vice president.

Q. Did they give you any reason why they did not want to renew the policy?

A. Well, they felt—I think there was a Mr. Hitchings there who was with the Claims Department, claims attorney, and they felt from their reports and inspection that had come in up to date that there were going to be some serious claims resulting

(Testimony of J. Stuart Leavy.)

from the operation, and they wanted to retire from the risk.

Q. (By Mr. Denecke): Was there anything said, Mr. Leavy, about whether or not they expected to suffer any loss by reason of writing this policy?

A. Whether they expected——

Q. To suffer any losses by reason of the writing of this policy?

A. Well, they already had them up to that date.

Q. I should say losses by reason of damage to the railroad.

A. I don't recall that the railroad was specifically mentioned. I don't remember that.

Q. Other than the damage to the railroad there had been one personal injury; was there not?

A. Well, I recall the one where an engineer stopped his train suddenly because of a boulder on the track, and it was an old train, as I recall, a logging train, and the couplings were so far apart that when the train came together it threw the conductor of the freight train out of his cab and onto the floor, [210] and I think—I don't know how it was settled, but it was a rather serious claim at the time. At least they thought so.

Q. Other than the personal injury loss which you mention here, were all the other losses which you were discussing down there in March or April concerning the damage to the railroad?

A. All the other losses?

Q. All the other claims or losses or whatever you want to call them.

(Testimony of J. Stuart Leavy.)

A. I can't remember that.

Q. Let me ask it this way. Mr. Leavy, was that the principal subject of discussion, as to the possible loss for damage to the railroad property?

A. I believe, the best I can recollect, that first of all that the risk is what is commonly known because rock blasting and so forth comes in the category of what we called a dangerous or a hot risk and that there would be eventually heavy claims would result because of the terrain of the country and what might happen to the railroad track down below, which we had one loss up there, as I recall it, of some rock that went through a cabin, and the whole character of the risk was why they wanted to get off of it.

The Court: I did not hear, cabin of the Southern Pacific?

The Witness: Yes, sir.

The Court: Well, at the time that you talked to the vice [211] president and superintendent of agencies down there in San Francisco, did you tell them that Kuckenberg was asserting a number of claims against the insurance company by reason of damage to the railroad's property?

The Witness: No, I think that information was already down there.

The Court: That was in April of 1948?

The Witness: 1948.

The Court: But you did not mention it to the company?

The Witness: I don't recall, your Honor. There

(Testimony of J. Stuart Leavy.)

was a general discussion. I was arguing with them for a different reason. I felt that we had written a bond and taken a very substantial premium from the contractor and that the company had some obligation to ride the risk through.

The Court: All right.

Q. (By Mr. Denecke): Are you familiar, Mr. Leavy, with the nature of the claims that Kuckenberg Construction Company has made against Hartford for damage to the railroad?

A. Well, some of them I think I can recall. I remember one that stands out in my memory where a, what do you call this water that comes down in a——

Q. Falls, creek?

A. Not a falls, the lumber where your water comes down—flume. That got out of hand and came down in under Kuckenberg's operations, and in turn went on down to the railroad track [212] and caused them considerable damage, and it was something over which the contractor certainly had no control, and I think that did considerable damage, as I remember it.

Q. Are you familiar with any, generally, with the other claims? A. Some of them, yes.

Q. Those that you are familiar with, Mr. Leavy, do you consider them, in your judgment, accidental or operational?

Mr. Gearin: We object to that, your Honor.

Mr. Mautz: Could I ask him one question, your Honor?

(Testimony of J. Stuart Leavy.)

The Court: Yes.

Q. (By Mr. Mautz): Do you consider those claims, Mr. Leavy, of which you have personal knowlege that have been presented to the insurance company by Mr. Kuckenberg or his company, do you consider them accidental damage claims within the intent and purview of the insurance policy which you wrote for him?

Mr. Powers: We will object to that question. He has no way of knowing that.

The Court: Objection sustained. In the first place, the vice of that question is nobody knows the facts upon which Mr. Leavy is going to make his determination or render his opinion.

Q. (By Mr. Mautz): Could you tell the Court, Mr. Leavy, in addition to the flume damage claim which you just referred ([213] to and had knowledge about, of any other specific claims that Mr. Kuckenberg has presented to the insurance company that constitutes, in your opinion, under this policy which you wrote, accidental damage?

Mr. Powers: Same objection.

The Witness: Well, I don't——

The Court: Let him answer the question. Go ahead, answer.

The Witness: I remember on one trip going up there and seeing a tremendous amount of rock that had come down where they had had a—I don't know what happened, but it was a huge big wedge of rock that came down the mountain, as something that

(Testimony of J. Stuart Leavy.)

they had not anticipated or something had got out of hand, I don't know which.

Q. (By Mr. Mautz): You would consider those accidental damages?

Mr. Powers: Just a moment, he said he didn't know what happened.

The Witness: I wasn't there when it occurred. I saw the result of it, and it was a tremendous pile of rock that was coming down the side of the mountain.

Mr. Denecke: That is all, your Honor. [214]

Cross-Examination

By Mr. Powers:

Q. Just a question or two. You were having quite a time, keeping the Hartford on this risk; were you not?

A. Well, I would not say it was so bad.

Q. Well, you were making representations by letters and so forth that this was clearly not accidental—I will put it that way—isn't that the fact?

A. No, that is not the fact.

Q. All right.

A. I don't understand your question. You mean when I went——

Q. I will ask you this——

A. When I went to San Francisco?

Q. No, whether you did not represent to Hartford you had inspected the job and anybody could see these were just just going to happen, they were

(Testimony of J. Stuart Leavy.)

not accidents? Did you not write that to the Hartford in this letter written May 22nd, 1948, Mr. Leavy, and I will call your attention to the third paragraph.

(Document presented to the witness.)

Q. It was your opinion at that time then, was it, that—May 22nd, 1948, "I might add—" This was written to Mr. Posey, the man you referred to—"I might add that when we were up on the job, Louis Krill took some more pictures; and they will indicate quite conclusively, at least in my mind, that the blasting of rock and the muck that went with it could not help but cause damage to the railroad tracks." That was your opinion then, was it [215] not?

A. That is in the one particular instance.

Q. You were writing about the general situation with respect to accidents; were you not?

A. No, we were talking about the ones that he took the pictures of.

Q. At this time when this was written the Hartford really wanted the policy canceled and they——

A. Not canceled. They didn't want to renew it.

Q. This was subsequent to the time it was renewed; was it not? A. Oh yes, that's right.

Q. And they kept wanting to cancel it?

A. That's right.

Q. And finally it was canceled?

A. That's right.

Q. And so this was something that they would act on when you wrote this, is it not, to the effect

(Testimony of J. Stuart Leavy.)

that you consider these not accidental at least when you went down to the job; isn't that true?

A. As to that particular event, yes.

Q. It was your intention to write the policy as it was written, that is, an accident policy, and an accident basis, that is correct, isn't it, Mr. Leavy?

A. That's right.

Q. Then, so far as the question about the—which the Court asked you about considering claims, whether you did consider [216] these as claims or whether they could be considered as claims—will you mark this?

(Document, Western Union Telegram, July 6, 1948, marked Defendant's Exhibit No. 117 for identification.)

Q. Did you represent to the Hartford that these claims of Kuckenberg's, so-called lists of Kuckenberg's claims, that he was not going to present those for claims against the Hartford, in July of 1948, and actually put them in as an offset against the Southern Pacific claim; that they were fighting with the Southern Pacific to get it straightened out?

The Court: Is that after the policy was canceled?

Mr. Powers: No, this was the time when they were trying to keep the policy from being canceled. It was before it was canceled.

The Witness: Well, in this "Confidentially such bills are being presented in anticipation of offset against any future claims which the Southern Pa-

(Testimony of J. Stuart Leavy.)

cific might bring against Kuckenberg," that might have been my opinion at that time.

Q. Yes, in other words, you did not expect any claims at that time, and it was your information that they were just using them as an offset against Southern Pacific?

A. Yes, I am frank to say I am a little vague about it, taking it from this. You see, at the time the policy was renewed we wrote a special letter.

Q. I think I have that here. [217]

A. I think that you have it, and this harks back to the letter that was written.

Mr. Powers: We will offer Defendant's Exhibit No. 116 for identification in evidence.

The Court: Any objection?

Mr. Gearin: No objection.

Mr. Denecke: No objection.

The Court: It may be admitted.

(Document previously marked Defendant's Exhibit No. 116 for identification was received in evidence.)

The Witness: I would like to mention, if your Honor please, what my opinion is in there, that I stated also in this wire: "Obviously this whole matter is involved to a point where it goes beyond either our field as agents or our capacity since legal questions are imminent."

Q. (By Mr. Powers): Did you want to see the original letter when it was renewed?

(Testimony of J. Stuart Leavy.)

A. Yes, I could not find it. Did you get it out of our file?

Q. No, I got it from counsel for Kuckenberg, the plaintiffs. I don't know. He had it marked for identification. That is where I got it. I don't know where it came from.

Mr. Mautz: It is addressed to us, no reason why we should not have it.

Examination

By the Court:

Q. Mr. Leavy, about how much was the premium on these policies on this job? [218]

A. Well, that is—I can get it for you, your Honor, but, you see, in that policy it is blanketed, and there were a lot of charges in that policy that are not chargeable against the job. For instance, Kuckenberg Construction Company had a large fleet of trucks which made up about 50 per cent of the premium. It is my recollection that the premium the first year ran about $12,000 in the over-all picture. I might be wrong about that.

Q. So for this particular job, taking out the fleet of cars, it would be approximately $6,000?

A. That's right.

Q. Now, I understand that in March or April you asked the company to renew even though you knew they wanted to get off the risk; is that right?

A. That's right.

Q. You have represented the company for how long?

(Testimony of J. Stuart Leavy.)

A. Well, our agency since 1914, I think it is.

Q. You tried to give the company good business, and you tried to get good business for yourself; is that right? A. Yes, sir.

Q. Now, at the time that you asked the company to renew did you know that the company was contending that the policy covered them on about 60 different items of damage running up to many, many thousands of dollars?

A. I don't remember any such amounts as that, your Honor, no.

Q. For the period of seven months prior to the time that you [219] asked them to renew there was over 60 different claims totalling many times the amount of the premium. You would not have asked the company to renew if you knew of those facts, would you?

A. Well, no, only to the extent that all the damages or the claims that resulted, but the accident and whatever happened were not all accidents within the terms of the property damage. There could be operational damage there that would not be chargeable against the policy.

Q. Well, how many, did you have any information——

A. Well, I didn't have that, your Honor. These claims went in direct to the Claims Department. We don't always see those.

Q. (By Mr. Powers): Mr. Leavy, getting back to the question the Court asked you about the pre-

(Testimony of J. Stuart Leavy.)

mium paid for this policy, in addition to covering this particular job it covered other operations of Kuckenberg, didn't it? A. Yes.

Q. Is it not a fact that the premium for the year—isn't it a fact that the premium was written on the lowest rate that you could possibly get because of your representations that there was really nothing involved, and that premium instead of being 12,000 was $1,633 for the year?

A. I can't answer that without——

Q. Could you if you see the policy?

A. I could if I saw the audit. The premium comes at the end of the job. [220]

Q. Could you tell anything from the rate that was given?

A. No, we have to take the rate and apply it to the payroll, and you do not get that until the policy expires.

Q. If the Hartford's actual records show that—— A. They have the record of it.

Q. And that would be——

A. The $1600 would be what we call a deposit premium.

Q. Just as a matter of getting records, Mr. Leavy, because you couldn't very well remember premiums collected on this since 1948, as I know, having paid some now for the period from June 26, 1947, to July 27, 1948, what does the earned premium show? That is over the period of a year, that is $1,801? A. $1,801.

Q. And 23 cents?

(Testimony of J. Stuart Leavy.)

A. Yes. What policy is that?

Q. That covers Kuckenberg Construction Company in all their operations, doesn't it?

A. There may be something wrong with that. Where is your fleet in there?

Q. "Driving other cars"?

A. No, "Auto zone."

Q. Here it is (indicating).

A. Here, you see, 2100. This $1800 is what is left over after the deposit so you have 3900 plus 1800.

Q. What is this return then? What is this return, the earned [221] premium, what does earned premium mean?

A. Premium developed by the payroll with the rate applied to it.

Q. Well, isn't that thing related to this over here (indicating)?

A. Here it is over here (indicating).

Q. Now, the Santiam is, are both these Santiam?

A. Yes.

Q. He has got in another column Harbor Drive in Portland? A. Correct.

Q. Where is this, his permanent yard?

A. That's right.

The Court: I may be mistaken, but I was under the impression that Mr. Kuckenberg had a public liability and property damage policy which covered all of his operations, but by reason of the contract between the Bureau of Roads on this specific contract it was necessary for him to take out two new

(Testimony of J. Stuart Leavy.)

policies, one a railroad protection policy, and the other a specific public liability policy with the contract endorsement; am I correct on that?

Q. (By Mr. Powers): What is the fact there, Mr. Leavy?

A. Well, the specifications required that the contractor maintain insurance of certain limits, public liability and property damage. Now, if he has an insurance already in existence, that policy answers the particular requirement, and the extra policy that we wrote was the railroad protective policy, in the name of the Southern Pacific. [222]

The Court: But the blanket public liability and property damage policy required by the contract was the one that Mr. Kuckenberg had for all of his properties?

The Witness: Yes.

The Court: Oh, I was in error.

Q. (By Mr. Powers): Mr. Leavy, many times you wrote and notified Kuckenberg and his attorneys, did you not, that the policy you wrote would not cover operational damage; isn't that true?

A. Well, I don't say many times. I had a discussion with Mr. Kuckenberg more often about it, and I had one discussion, I think, with Mr. Souther about it.

Q. And then you notified the—as a matter of fact, you notified them in writing at one time, didn't you?

A. Well, that latter part of it here I dictated.

(Testimony of J. Stuart Leavy.)

Q. Yes, and that was the purpose of that, to tell them that you would be bound only by the contract, which was accidental, not for operational claims? A. That is correct.

Q. Up to that time no claims had actually been filed, had they? A. I cannot answer that.

The Court: What month was the letter written?

Mr. Powers: In April, 1948.

Q. (By Mr. Powers): Well, it was after that, it was in June of that year that our exhibit, which is Exhibit—or July 6th that you wired the Hartford stating that, about these bills, there had been these [223] bills: "Confidentially such bills are being presented in anticipation of offset against any future claims which the Southern Pacific might bring against Kuckenberg. Mister Souther advises there is no thought of litigation in the minds of either Kuckenberg or himself as respects Hartford contracts."

Now, that was your understanding then, was it?

A. Yes, as I recall, it has come back to me now, in reference to that letter that I said I dictated that was thought necessary because the Hartford anticipated there would be an argument, let us say, as to to what would be operational and what would be accidental.

Mr. Powers: We will offer Defendant's Exhibit No. 117 in evidence, your Honor. Counsel has seen it.

(Testimony of J. Stuart Leavy.)

The Court: Any objection to it?

Mr. Gearin: As long as it is not signed by us, I have no objection to it.

Mr. Mautz: If Mr. Powers considers it impeaching of Mr. Leavy, we have no objection. It can serve no other purpose because it is written by Mr. Leavy, addressed to the Hartford, and it could not bind us anyhow.

Mr. Powers: I move that the argument be deferred to the end of the trial, your Honor, and that the remarks of counsel be stricken. It is necessary in order to refresh Mr. Leavy's memory, as I have said, during the time. He couldn't remember back five years——

Mr. Mautz: Well, counsel in his extensive experience knows [224] when he refreshes a witness' memory with a document he does not put that document in evidence. We have the privilege of doing so if we want to, so if it is not offered to impeach Mr. Leavy it is not offered.

The Court: I think you are right, Mr. Mautz, but I will let it in anyway.

(Document previously marked Defendants' Exhibit No. 117 for identification was received in evidence.)

Mr. Powers: That is all.

(Testimony of J. Stuart Leavy.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Leavy, I am handing you the exhibit which has been marked Exhibit No. 3 in this case and ask you if that isn't a policy in which Southern Pacific Company and the Western Union Telegraph Company is the named insured? A. Yes.

Q. That is the policy that was obtained by Mr. Kuckenberg to comply with the terms of the requirements of the contract of the Public Works Administration? A. That's right.

Q. Now, I direct your attention, Mr. Leavy, to, what do you call this endorsement, No. 1?

A. Yes, sir. [225]

Q. And refer to Paragraph LL of the endorsement, of said endorsement, and which provides that: "the term 'property' " as defined in the contract of insurance, "shall include property in the custody of the Railroad and property of the Railroad."

Now was that language—why was that endorsement attached to the contract?

A. Well, we will have to disclaim any responsibility for this because this endorsement was gotten up by the Southern Pacific Company, and it is their own contract.

Q. That is the contract?

A. I mean, this is what we were required to write.

Q. That's right, well, you wrote it; didn't you?

(Testimony of J. Stuart Leavy.)

A. Yes.

Q. I am referring—you have the document No. 43726. I am handing you our copy of it which is the identical thing dated May 14, 1947. It bears your signature countersigned as the authorized agent?

A. That's right.

Q. And you say that that was required by the railroad? A. Yes, sir.

Q. And you were, you executed that at the request of the railroad?

A. Well, indirectly, that is the railroad informed the contractor who in turn informed us that the railroad company [226] would require this policy and have required their own form of endorsement.

Q. Well, there is no question but what the endorsement No. 1 attached to the exhibit which you hold in your hand was countersigned by you, is there? A. No, sir.

Q. And what was endorsement part LL of the endorsement No. 1 you don't know anything about the necessity for that or anything else. You were told to put it in, and you did it?

A. That's right.

The Court: Let me see this.

Mr. Gearin: I think it has to be read in light, your Honor, of a certain directive in the contract which will be introduced in evidence at a subsequent time.

Q. (By Mr. Gearin): Now, Mr. Leavy, the policy of public liability insurance which Hartford —which Mr. Kuckenberg obtained with Hartford

(Testimony of J. Stuart Leavy.)

was to protect Kuckenberg against claims of all third parties? A. Right.

Q. Which included the claims of the Southern Pacific for damage? A. Anybody.

Q. Anybody.

The Court: Including the Southern Pacific?

Mr. Gearin: Yes. [227]

The Witness: Anyone.

Q. (By Mr. Gearin): At that time you knew of Kuckenberg's obligations under the contracts with the Public Works Administration, first as to their obligation to the Southern Pacific and, secondly, their obligations to provide the insurance for Southern Pacific?

A. Yes, sir.

Q. Those were the policies which were issued with those obligations in mind? A. Yes.

Q. I do not know how to phrase this next question, Mr. Leavy, but had it ever been brought to your attention—was the policy that was issued to Kuckenberg with Kuckenberg as the named insured a policy which would protect and indemnify them as against all liability imposed by law arising out of their obligations? A. Yes.

Q. Had it been brought to your attention, Mr. Leavy, of the liability imposed by law as a result of blasting operation? A. Yes.

Q. In other words, in your average public liability insurance policy refrerring to automobiles there must be legal liability and negligence, and you had

(Testimony of J. Stuart Leavy.)

been advised at that time that as far as blasting was concerned there was absolute liability for damage?

Mr. Denecke: Where there was blasting.

The Witness: I would not say that I know there was absolute liability. I know the policy would cover legal liability as a result of any damage from blasting.

Q. As I understand it, you say that Mr. Kuckenberg had a policy of public liability which was broad enough to cover the requirements of his contract with the Public Works Administration?

A. Yes.

Q. Mr. Leavy, was there not a special endorsement to that policy covering the particular contractual requirements?

A. No, there would have been if the policy had not been written, one written in the name of Southern Pacific.

Q. Oh, I see.

A. There is no point in charging a contractor twice for the same thing.

Mr. Gearin: Thank you, I have nothing further, your Honor.

Cross-Examination

By Mr. Powers:

Q. Just one or two questions. That means arising out of an accident, doesn't it, Mr. Leavy?

A. Which is that?

Q. The Southern Pacific policy used the word "accident" too; [229] did it not?

A. If I could see it, I could tell you. They have

(Testimony of J. Stuart Leavy.)

made some changes. Ordinarily it has the words "by accident" in it.

Q. Of course, the policy speaks for itself.

A. "Caused by accident."

Mr. Gearin: From the agreement Nos. I and II.

The Witness: "Caused by accident."

Q. (By Mr. Powers): So that is limited to caused by accident, isn't it?

A. I would think so.

Q. Mr. Leavy, in the fall of 1947 sometime after this policy had first been written, is it not a fact that after Mr. Krill had a claim that took him down to the scene of the accident and he saw how rocks were falling down, one thing and another, that Mr. Robinson came to your office in Portland on his way back from Seattle and discussed that with you, and he wanted to cancel it because it didn't want any misinterpretation with anyone, and you assured him at that time that they understood there would be no claim for that type of damage to the railroad track?

A. Well, the only thing I can remember, Mr. Powers, was if that conversation occurred subsequent to this letter that we dictated, I think we did, but I don't recall that before that.

Q. This would be in September, 1947? [230]

A. No, that was '47—'48.

Q. Do you remember the conversation at that time that they came up there? A. In '47?

Q. Yes, in the fall of '47.

A. I am sorry, I don't recall that. I talked—we

(Testimony of J. Stuart Leavy.)

were talking with Mr. Robinson about the risk, but I don't recall that early as 1947, because nothing had happened in 1947.

Q. When you did talk to him, why, you told him, did you not, that there would be no claims made for that type of damage that they were doing down at the track, on this policy?

Mr. Mautz: That is not binding on that, your Honor.

The Court: There is so much evidence in here that is inadmissible that I am not going to stop now.

Q. (By Mr. Powers): At the time you said you had a conversation with Mr. Robinson, did you not assure him at that time that there would be no claim for this type of damage?

A. Well, our policy did not attach until the spring of 1947, and you say this conversation was in the fall of 1947?

Q. That is what I was asking you, and you say it was later?

A. Well, within my memory, the way I recall it is a conversation with Mr. Robinson which was subsequent to this letter that we wrote, which was in April of 1948.

Q. What was that? [231]

A. That is, that there would be no claims that any damage done by, unless, if it was operational, in other words, rather than accidental.

Q. You don't recall that conversation back in September?

(Testimony of J. Stuart Leavy.)

A. In September, 1947, no, I don't remember.

Mr. Powers: I think that is all.

Redirect Examination

By Mr. Mautz:

Q. But, subsequently Mr. Robinson, after he saw or Mr. Krill told him that there were rocks dropping down on the Southern Pacific track resulting from this job, he wanted to get off this legal liability policy; did he not?

A. That was near the renewal date.

Q. Yes, whenever it was, Mr. Leavy?

A. Yes.

Q. Your talk with Mr. Souther, as reflected in the wire, had to do with distinguishing between those claims that were coming up that might be considered operational and those claims that might be considered accidental; isn't that so?

A. Yes, I think that's right.

Q. When you wired the Hartford in May of 1948 that Mr. Souther did not anticipate any case against the Hartford, you did not anticipate that your client here was going to have a case against them at that time either, did you, Mr. Leavy?

A. No. [232]

Q. Now, counsel has gone into some length with you about premiums. As a matter of fact, when you are writing a line of coverage for somebody like Kuckenberg or Kuckenberg Construction Company, you do not base value of the account just upon the premium of one policy, do you, either for yourself or for your company? A. That's right.

(Testimony of J. Stuart Leavy.)

Q. You were writing the bond on this job?

A. That's right.

Q. And you had other allied lines for Mr. Kuckenberg? A. That's right.

Q. And all that is taken into consideration as to whether it is a desirable account or not, is it not?

A. That's right.

Mr. Mautz: That's all.

Recross-Examination

By Mr. Powers:

Q. Mr. Leavy, the bond was not in the Hartford, was it? A. It certainly was.

Q. Well, I am asking.

Mr. Mautz: He answered.

Q. (By Mr. Powers): Was it?

A. Yes, about $38,000 worth.

Q. But, I mean, was it carried right through all the time? [233] A. Sure.

Q. That is all.

Recross-Examination

By Mr. Gearin:

Q. I would like to ask Mr. Leavy, I would like to have him explain this telegram.

I will let you read it with me, Mr. Leavy: "Have had lengthy discussion with Mister Souther regarding Kuckenberg and bills of latter presented to Southern Pacific have all been denied."

In other words, you knew that the contractor

(Testimony of J. Stuart Leavy.)

was trying to get Southern Pacific to pay for damage to the track?

A. I knew they were, and this is from memory, your Honor, I knew there were claims arising, claims from the Southern Pacific, and some of them, as I remember, were claims which Kuckenberg did not feel he was responsible for.

Q. I see. Then when you say: "Confidentially such bills are being presented in anticipation of offset against any future claims which the Southern Pacific might bring against Kuckenberg," in other words, the trap was laid at that time to present these claims against us and hoping that they would scare the Southern Pacific Company out of presenting any claims; was that what they were doing?

A. Are you asking me if I laid a trap? [234]

Q. No, not you, nobody is pointing a finger at you, but I want to know why you say confidentially. Was there some confidential agreement between you and Mr. Souther or Kuckenberg and Mr. Souther about how they were going to get Southern Pacific in the picture?

A. No, I think our relationship with the company we represent in a matter of that kind, I would use the word "confidential" hoping what wouldn't happen is what has happened.

Mr. Gearin: That is all, thank you.

Mr. Denecke: No further questions.

(Witness excused.) [235]

HENRY A. KUCKENBERG

recalled, testified further as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Kuckenberg, you were presented with certain claims by the Southern Pacific during the course of this work; were you not?

A. Yes, we were.

Q. And all those claims have now been paid by you except those for which Southern Pacific is now counterclaiming?

A. That is correct. We paid all the bills that we felt our company were liable for. All that we left were accidental damage we presented to the insurance company to pay, which they have done in the past, and these they refused.

Mr. Denecke: That is all, your Honor.

The Court: You mean Hartford has not paid any of these?

A. That's right. We presented them to Hartford.

Q. (By Mr. Powers): Well, you knew all along, did you, Mr. Kuckenberg, that the Hartford was not going to pay for what might be operational in nature, and they were only concerned with accidents?

A. That's right, we only presented them with accidental damage claims.

Mr. Powers: That's all.

Q. (By Mr. Gearin): Mr. Kuckenberg, the

(Testimony of Henry A. Kuckenberg.)

bills that you submitted to the Southern Pacific, were those covering accidents or operation?

A. Accidental claims, accidental damage claims, what were [236] presented Hartford.

Q. Maybe you misunderstood me. The bills that you submitted to the Southern Pacific Company covered accidental damage or operational damage?

The Court: Or neither?

The Witness: I would say that I think we would have to take them one at a time. I would say when a train ran off the track, I would say we considered that that was your own damage. We had nothing to do with it whatsoever, and we billed you for the time that we spent getting your cars out, as I recall it.

Q. Now, what about the Mayflower Creek washout?

A. We were instructed by your people to repair your tracks and to repair the work around your tracks, and we felt that that was your damage.

Q. I see.

A. Whether you had insurance to cover it, we didn't know. We felt that you should pay us for that.

Q. And the same about reconditioning?

A. Yes.

Q. And where the shots fell on the track did you, those are all the same?

A. That's right.

Q. You felt that those damages were not occasioned in whole or in part by any activities of

(Testimony of Henry A. Kuckenberg.)

yours? A. That's right; that is correct. [237]

Q. They were not accidents?

A. They might have been accidents. I don't say they were not, but my claim is that we were not responsible for them, but the Southern Pacific were, and we were looking to you for payment.

Q. And those bills that were submitted to you by Southern Pacific Company covering items of train delay you received——

A. Anything that was accidental damage we sent to Hartford for to pay them, and any of the bills that we felt were our liability we paid.

Q. Then our bills that we submitted, did you turn those over to Hartford for payment?

A. That is just what I have told you. Some of them we did, and the others we paid.

Q. I see, that's all.

Mr. Powers: That is all.

Mr. Denecke: That is all.

Your Honor, I would like to introduce an exhibit that we have had in the Pretrial, a letter that has been talked about here in the testimony that we marked Plaintiffs' Exhibit 16.

The Court: You all have Mr. Denecke's exhibit numbers and the description of the exhibits which he had marked. Is there any objection to having all such exhibits admitted in evidence?

Mr. Gearin: We have no objection to any pretrial exhibits, your Honor. [238]

Mr. Powers: We have none, with this provision, that this starts out a series of correspondence that

follows along and needs the others to complete it over a period of just a couple of months involving this same thing.

Mr. Denecke: Not this one, your Honor.

Mr. Powers: I am speaking of this letter of April 15, 1948. I have them marked for identification over there now, and if this goes in I would like to have the rest of it go in to show what goes on.

The Court: Any objection, Mr. Denecke?

Mr. Denecke: Well, your Honor, this letter that I referred to there was the letter from Kuckenberg Construction Company, rather from Jewett, Barton, Leavy & Kern, and Kuckenberg Construction Company, this correspondence back and forth between Hartford and Mr. Leavy. I think Mr. Leavy testified this is the only letter he sent to Kuckenberg. I have looked at these, and I may have no objection, your Honor.

Mr. Mautz: They are along the same line of the wire, your Honor. If you are going to let the wire in, you may as well let them all in.

The Court: They may be admitted. Mr. Denecke, any more testimony?

Mr. Denecke: No, your Honor.

The Court: Mr. Powers, do you have anyything?

Mr. Powers: I don't believe there is anything else, your Honor. [239]

Oh, yes, since Mr. Robinson is here I might just ask a question or two. [240]

EDWARD W. ROBINSON

a witness produced in behalf of defendant Hartford Accident and Indemnity Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. Mr. Robinson, where do you live?

A. Corte Madera, California.

Q. Is that somewhere around San Francisco?

A. It is about 14 miles north of San Francisco.

Q. And you are employed where?

A. Hartford Accident and Indemnity Company.

Q. You work in and travel out of the Hartford office in San Francisco, do you?

A. That is right.

Q. In what branch of the company are you?

A. I am superintendent of the General Liability Department.

Q. Now, in connection with this policy of Kuckenberg's that we are discussing here, what kind of a premium was given that, as being high or low?

A. I do not remember particularly the premium rate for the Kuckenberg policy although I believe there was a reduction from annual rates.

Q. Then I will ask you when you first had any conversation with Mr. Stuart Leavy about this policy? A. In October, 1947. [241]

Q. Do you remember the date?

A. I think it is October 20, 21.

(Testimony of Edward W. Robinson.)

Q. Did you check your records or expense account? A. I checked my expense account.

Q. What was the conversation, that is, whether you asked Mr. Leavy about——

Mr. Mautz: Unless, your Honor is going to let in everything I do not know whether conversation between Mr. Robinson and Mr. Leavy would be binding upon the other parties.

The Court: I know it.

Mr. Mautz: But, in view of your Honor's ruling we would like the record to show a continuing objection, and we remain silent.

Mr. Powers: What was that?

The Witness: I had been in Seattle and met Mr. Hitchings who is our Pacific Coast claims attorney. He had been in Portland here, and Mr. Krill had been out on the job on, I think, a couple bodily injury cases.

Q. A couple personal injuries?

The Witness: Bodily injury cases, and he had seen this rock coming down on the track so Mr. Hitchings talked to me in Seattle and I intended to go direct to San Francisco, but stopped off here and saw Mr. Leavy. I spoke to him about it. I do not believe that any claims have been presented to us at that time, and told him that where damage was done, if somebody would try to collect we didn't continue on any policy if there was possibility [242] of a dispute in the event of a claim.

Q. What did Mr. Leavy say about that?

(Testimony of Edward W. Robinson.)

A. He assured me there would be no claims. Mr. Kuckenberg understood the coverage.

Q. No claims for damage to the track?

A. That is right.

Q. That is in 1947? A. Yes.

Q. That is all.

Cross-Examination

By Mr. Mautz:

Q. Nobody from Kuckenberg was there, Mr. Robinson? Any of his attorneys? A. No.

Mr. Mautz: That is all.

Mr. Powers: Is that all?

Mr. Gearin: That is all.

Mr. Powers: If everyone has rested on this portion of the case, which I assume they have—has plaintiff rested?

Mr. Denecke: Yes.

Mr. Powers: Has Southern Pacific rested?

Mr. Mautz: They never rest.

Mr. Gearin: You don't give me a chance.

Your Honor, other than to present testimony as to our damage on the counterclaim, we have no further evidence to introduce. [243]

The Court: I told you, Mr. Powers, that if I felt it necessary I would give you an opportunity to bring your witnesses from San Francisco, but I have not found it necessary yet. I may, but go ahead. You wanted to say something?

Mr. Powers: I was going to move the Court now

to make a finding that under the evidence presented here that the series of occurrences or events following a general pattern as they do constitute an operation which could have been reasonably foreseen and which was actually provided for and warned against and told about in the contract in figuring and telling them to figure and make whatever allowance was necessary and, therefore, the Court at this time find that the series of events presented do not constitute accidents, therefore, there is no coverage under the policy, and that summary judgment be entered in favor of the defendant Hartford Accident Indemnity Company.

Mr. Denecke: Your Honor, I have done quite a great deal of research on this problem. It is not quite in form which I would like to submit to the Court so I ask leave to submit to the Court written brief on this one particular point that these events did constitute accidents.

The Court: I think that is the principal question, whether or not the facts indicate that these occurrences were accidents.

I think we have got two legal words there, accidents and occurrences, each with specific meanings. I am not going to give the testimony of Mr. Leavy much credence. [244]

I want to say I was surprised and pleased to see an agent go to bat for his client as well as Mr. Leavy did, but he is not in a position to vary the terms of that contract, but I did listen to what he had to say about what constitutes an accident, and I was wondering whether or not the authorities support his

statement, and I understand that that is what you are going to present me with in brief.

Mr. Denecke: That is correct, your Honor.

The Court: I am going to suggest this, that Hartford prepare no form of brief. You just give me the cases upon which you rely and send me a copy and send Mr. Gearin—he does not want one—send it to Mr. Powers, and Mr. Powers, in a reasonable length of time, try to get in your answer. That is all I ask you for, is to give me the list of your cases. I will read the cases myself. Give me the cases that are in point.

(Discussion off the record.)

The Court: I am going to deny your motion for summary judgment, Mr. Powers, because I do not think that that is the right kind of motion.

This case is here on the question of liability, and if I find for you on an issue, it will not be a summary judgment; it will be determinative.

Mr. Powers: I will change the motion, then, and correct it in accordance with the Court's views to make it final and determinative of the final issues by that one issue. [245]

Mr. Gearin: Having the benefit of the testimony, I think your Honor will have to make findings as to the type of accident covered in the remaining four charges of the plaintiffs against the Southern Pacific Company, the derailment, the wash-out, the road falling on the track, and the general resurfacing, those being the four elements.

The Court: I will never be in a better position to

decide a couple of them than now. I am going to hold against Kuckenberg on the resurfacing.

Now, I think the Southern Pacific may have had some advantage, but that was contemplated in the policy and, therefore, I am going to hold against Kuckenberg on that point.

Now, what was the third point you had?

Mr. Gearin: There are four of them.

The Court: Give me number three.

Mr. Denecke: That was the section of the road that fell on the track, your Honor.

The Court: I am going against you, against Kuckenberg on number three.

Now, with reference to the railroad——

Mr. Gearin: The derailment.

The Court: The derailment, it seems to me that Kuckenberg has a good claim there, a car going eight miles an hour, and there was only three-sixteenths of an inch out of line. I just cannot see how Kuckenberg could have taken more precautions. Here the work was being performed by Kuckenberg's men but under [246] the general supervision of one of the men who works for Southern Pacific, and so I am going to hold against Southern Pacific on that one, and hold with Kuckenberg.

Mr. Gearin: The next one is the washout of the bridge where debris got under the bridge and water had to go over the ties.

The Court: I do not know about that one. I do not know if I have enough evidence to decide it. I know that in that area—Mr. Denecke had it here in a different case—that there are unusual freshets and

water coming down these little rivers, but it has not been made clear to me as to whether this mud and clay and debris and various other items that washed into the river came from locations in which they were working.

Mr. Gearin: The testimony is, if I may refer to it briefly, your Honor, by our two witnesses, is that the mud, clay and rocks came from a slide directly above the bridge, and I think that is the testimony. I think that is all the testimony on the case.

The Court: Was the contractor working around there?

Mr. Gearin: That is correct, and fill was put in by the contractor.

The Court: Is that correct?

Mr. Denecke: Your Honor, I think the testimony of both witnesses was that they came up afterwards and thought that is where it came from, but this material, as I understand it, it [247-8] was, they said, the same kind of material as you find up and down the river so I know that that was their surmise that that was where it came from, but I think that is all it was.

The Court: However, you have the burden of proof on that.

Mr. Denecke: I realize that, your Honor.

The Court: In view of the fact that you have to sustain the burden, I am going to hold against you on that also, so the only one I hold with Kuckenberg is on the derailment.

Is there any question about damages on that one?

Mr. Gearin: Well, I think we might be able to

agree with Mr. Denecke on the damages. I think there may be a trade, as we always do. I think we might be in a position to attempt that. However, I want to put some strings on it as far as our claims are concerned when we prove our damages.

Mr. Denecke: Your Honor, is it sufficient now, if it looks like we can arrive at a figure there.

The Court: In other words, that means if I find in favor of Kuckenberg on that claim, I hold against you on your claim for $241. I believe you have a counterclaim for $241.

Mr. Gearin: Not on that. It will be so understood, your Honor, that we will not, in view of your Honor's finding, make any claim for the derailment expense.

The Court: Is there any other thing that we have to decide right now?

Mr. Gearin: No. [249]

Mr. Denecke: No.

The Court: I just want to say that when a contractor enters into the type of contract that Mr. Kuckenberg entered into with Southern Pacific, under these circumstances, that he is going to get the short end of the stick because there is blasting over there; there is work with heavy equipment, and before he can prevail on a claim he has got to bear the burden of proof, and it is a difficult thing, but that is one of the considerations that a contractor must contract in view of.

(Thereupon, the trial of the above-entitled cause was concluded.) [250]

Reporter's Certificate

I, Gordon R. Griffiths, an official reporter to the United States District Court of the District of Oregon, hereby certify that at the time and place mentioned in the caption of the above-entitled cause I reported in shorthand all testimony adduced and proceedings had in said cause; that my shorthand notes were thereafter reduced to typewriting, under my direction, and that the foregoing transcript consisted of 250 pages, is a true and correct transcript of all the testimony adduced and proceedings had as aforesaid, and of the whole thereof.

Witness my hand at Portland, Oregon, this 3rd day of July, 1954.

/s/ GORDON R. GRIFFITHS,
Official Court Reporter. [251]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents numbered from 1 to 10, inclusive, consisting of Pre-trial order; Copy of oral opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of appeal; Undertaking on appeal; Order extending time to July 6, 1954, to file

record on appeal; Designation of contents of record on appeal; Order to forward exhibits to Court of Appeals and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5092, in which Henry A. Kuckenberg, et al., are plaintiffs and appellants and Hartford Accident & Indemnity Company is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is being forwarded under separate cover the following exhibits: 2 to 6, inc.; 16-18 to 23, inc.; 25 A to 25 G, inc.; 26 A to 26 I, inc.; 27-28-101-107-110-112 to 121, inc., and 305. Transcripts referred to in appellants' designation not yet prepared, will be forwarded when completed.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 2nd day of July, 1954.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14,415. United States Court of Appeals for the Ninth Circuit. Henry A. Kuckenberg, Harriet Kuckenberg and Lawrence Kuckenberg, Doing Business as Kuckenberg Construction Co., Appellants, vs. Hartford Accident & Indemnity Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed July 6, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit
No. 14415

HENRY A. KUCKENBERG, HARRIET KUCKENBERG, AND LAWRENCE KUCKENBERG, d.b.a. KUCKENBERG CONSTRUCTION CO.,

Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation,

Respondent.

STATEMENT OF THE POINTS ON WHICH APPELLANTS INTEND TO RELY

Pursuant to Rule 19(c) of the Rule of the above-entitled Court the appellants present the following statements of the points on which they intend to rely on this appeal:

1. The Trial Court erred in finding and concluding that the injury and damage to the property of the Southern Pacific Company was the reasonably anticipated, ordinary and expected result of appellants operation under the circumstances and did not result from "accident." (Findings of Fact, Para. 13; Conclusions of Law, Para. 1).

2. The Trial Court erred in concluding that the respondent is not required under the relevant policies of insurance to appear and defend on behalf of the appellants against actions or claims brought against the appellants by Southern Pacific Com-

pany for damages resulting from appellants' road-building operations. (Conclusion of Law, Para. 3.)

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY,

By /s/ ARNO H. DENECKE,
Of Attorneys for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed July 9, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION AND APPLICATION TO BE RELIEVED FROM PRINTING OR REPRODUCING EXHIBITS

It is hereby Stipulated by and between the respective parties hereto acting by and through their respective attorneys that the parties hereto request the Court to be relieved from printing or reproducing exhibits introduced at the trial of this action, and request the Court that the exhibits be considered in their original form without reproduction.

Said request is made for the reason, among others, that a portion of some of said exhibits are more easily comprehended in their original form than they would be in reproduction.

/s/ ARNO H. DENECKE,
Of Attorneys for Appellants.

/s/ JAMES ARTHUR POWERS,

By /s/ EARLE P. SKOW,
Of Attorneys for Respondent.

[Endorsed]: Filed July 12, 1954.

No. 14415

United States
COURT OF APPEALS
for the Ninth Circuit

HENRY A. KUCKENBERG, HARRIET KUCKENBERG, and LAWRENCE KUCKENBERG, Doing Business As KUCKENBERG CONSTRUCTION CO.,

Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation,

Appellee.

APPELLANTS' BRIEF

Appeal from the United States District Court
For the District of Oregon.

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HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation,

Appellee.

APPELLANTS' BRIEF

Appeal from the United States District Court
For the District of Oregon.

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of The United States District Court for the District of Oregon. It is in essence an action on a liability policy by the appellants-insured against the insurer to recover for loss suffered by the insured because of the insured's damaging the track and roadbed of the Southern Pacific Com-

pany. Appellate jurisdiction is granted to this Court by Title 28, Section 1291, U.S.C.A. The Court below assumed jurisdiction based upon diversity of citizenship and the amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000.00.

STATEMENT OF CASE

The appellants were a partnership doing business as Kuckenberg Construction Company, and the plaintiff Henry Kuckenberg had been engaged in construction work since 1912 (Transcript 223).

On the 7th of May, 1947, the appellants entered into various contracts with The United States of America whereby they undertook to and did construct portions of a public highway known as the North Santiam Highway in Marion County, Oregon. One of the contracts being designated 24-A2 (Exhibit #1).

The appellants on April 1, 1947, contracted with and received from the appellee, Hartford Accident & Indemnity Company, a bodily injury property damage liability insurance policy No. LCX-2708 (Exhibit #2) effective April 1, 1947. This policy was cancelled by the appellee effective July 29, 1948.

The construction contract previously referred to required appellants to frequently work in close proximity to a railroad line of the Southern Pacific Company. During the process of the construction of the highway the track and property of the Southern Pacific Company were damaged and a substantial portion of the damage

was admittedly caused by appellants. This damage occurred during the period June 2, 1947 to July 29, 1948.

Inasmuch as appellants had labor and equipment available at the jobsite the Southern Pacific Company and appellants agreed that rather than the Southern Pacific Company do whatever repair work might become necessary on the track and make claim against appellants the appellants themselves would do the work, and this work was done during the period August 5, 1947 to July, 1949.

The appellee denied any and all liability to the appellants and refused to pay the appellants for any amounts expended by appellants in respect to repairs made to the railroad track and property.

The appellants then filed an action against the Hartford Accident & Indemnity Company and Southern Pacific Company seeking judgment for the costs of the repairs so made. The Southern Pacific Company answered and counterclaimed against the appellants in the sum of $8,762.16, the counterclaim being for the cost of repairs made by Southern Pacific Company and caused by damage to the track by the operations of the appellants. In the pre-trial order the Southern Pacific Company contended that the appellants' operations were negligently or intentionally conducted and that the damages sustained by Southern Pacific Company were occasioned solely and proximately by the conduct of appellants and that absolute liability is imposed on the appellants regardless of whether the damage resulted from the negligent or intentional conduct on the part of

appellants (pre-trial order contentions of Southern Pacific Company, 2, 2(a)).

The appellants tendered to appellee on December 1, 1949, the defense of the counterclaim brought by the Southern Pacific Company, and on December 7, 1949, the appellee refused to assume the defense to the counterclaim on behalf of the appellants.

Policy LCX 2708 (Exhibit #2) issued by the appellee to appellants contained an endorsement dated March 28, 1947, entitled "Property damage other than automobile" setting forth the obligation of the insurer to the appellants:

> "To pay on behalf of the insured those sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined in the policy for damages because of injuries to or destruction of property, including loss of use thereof, caused by accident, * * * "

That said policy LXC 2708 (Exhibit #2) paragraph II provided:

> "As respects such insurance as is afforded by the other terms of this policy, the company shall (a) defend in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent * * *."

In carrying out Contract No. 24-A2 the appellants were required in some instances to work over very rough terrain. Some of the terrain was actually located on the side of a canyon and the appellants in performing the contract did a certain amount of blasting.

Under the contract the appellants were required to clear and excavate and to construct new roadbed (Transcript 66).

Points on the ground on which the construction was being performed were located and designated by stations and these stations were 100 feet apart (Transcript 67). The new highway built by the appellants was above the railroad tracks varying in distance from 20 feet to 600 feet (Transcript 69—Findings Par. 13).

The terrain in the vicinity of the tracks varied in composition from gravel and dirt to hard rock, and the tracks and the property of the Southern Pacific were damaged at the stations indicated on appellants' Exhibit No. 28 (Transcript 71) and it was for those damages that action was commenced.

In all fairness to the appellee it is not the contention of the appellants that the appellee is responsible for the following items in Exhibit 28:

August 27, 1947, Station 620

October 7, 1947, Sardine Creek Trail derailment

January 7, 8, 9 and 10, 1948, Mayflower Creek washout

April 9, 1948, Station 699, road fell on track,

as these particular items of damage were not established as being due to the appellants operations and the facts relating to them were uncertain.

It is the appellants' contention that the damages occuring at the stations shown on Exhibit 28 with the exceptions above noted are covered by policy LCX 2708

(Exhibit #2) and that such damages were "caused by accident" as that term is used in the policy.

It is also the contention of the appellants that by the terms of the policy LCX 2708 (Exhibit #2) the Hartford Accident & Indemnity Company was required to defend appellants against the counterclaim asserted by Southern Pacific Company.

SPECIFICATION OF ERRORS

Appellants contend that the Trial Court erred in the following particulars:

1. In finding and concluding that the injury and damage to the property of the Southern Pacific Company was the reasonably anticipated, ordinary and expected result of appellants' operations under the circumstances and did not result from "accident" (Findings of Fact, Par. 13, Conclusions of Law, Par. 1).

2. In concluding that the appellee was not required under the relevant policy of insurance to appear and defend on behalf of the appellants against actions or claims brought against the appellants by the Southern Pacific Company for damages resulting from appellants' road building operations (Conclusions of Law, Par. 3).

ARGUMENT

Summary of Argument

As indicated in the Statement of Case and Specification of Errors, the appellants contend that the testimony

of the witnesses showed that the damages incurred at the stations listed on Exhibit 28 were accidental and covered by the policy LCX 2708. Appellants further contend that the allegations of the counterclaim of the Southern Pacific Company in both the pleadings and the pre-trial order (Pre-Trial Order Contentions of Southern Pacific Par. 2, 2a), were such that the appellee was obligated to defend the appellants against the counterclaim of the Southern Pacific Company under the provisions of Policy LCX 2708.

FIRST SPECIFICATION OF ERROR

The Trial Court erred in finding and concluding that the injury to the property of the Southern Pacific Company was the reasonably anticipated, ordinary and expected result of appellants' operations under the circumstances and did not result from accident (Findings of Fact, Par. 13, Conclusions of Law, Par. 1), for the reason that the evidence clearly indicates the damages were "caused by accident" as that term is used in the policy of insurance.

Argument, Point I

The injury and damage to the property of the Southern Pacific Company were fortuitous, unforeseen, untoward and unexpected and resulted from accident. The nature of the various accidents which caused damage to the track is shown in Exhibit #28.

The Trial Court received Exhibit #28 (Transcript 79) and permitted appellants, largely through witness Hilding F. Lind, to present detailed evidence of one or more accidents as illustrative of appellants' contention that the damages were "caused by accident".

> "The Court: I suggested to Mr. Denecke that in view of the fact that this is not a hearing on damages, that he only talk about such additional occurrences as are illustrative of his four types of claims, and if he has sufficient now to illustrate each of the four types, that he confine his other interrogation to the claims against the Southern Pacific. Go ahead.
>
> Mr. Denecke: Well, your Honor, I believe I have covered the various classifications as far as claims against the Hartford are concerned." (Transcript 100)

The accidents which resulted in damage to the Southern Pacific Company's track and property can be classified into three categories, as follows:

1. Those where appellants anticipated that rock would do damage to the tracks and roadbed and in order to prevent the damage the tracks were blanketed with protective materials, but through unforeseen circumstances the protective measures failed and damage was done.

2. Those where appellants had worked in an area and nothing had fallen on the track and then because of some combination of circumstances the appellants' work caused some object or objects to fall on the track doing damage.

3. Those where appellants anticipated that most of the rock being moved would not reach the track or roadbed and that if it did little damage would ensue. However, due to some unforeseen happening the small rocks would dislodge larger rocks which on some occasions would fall and hit the track or roadbed.

Illustrative of an accident falling within the first category was the testimony of Mr. Hilding F. Lind, the superintendent of appellants, and Exhibits 25A and 25B (Transcript 84-85-86):

"Mr. Gearin: Which station is this you refer to?
The Witness: 714.
Mr. Denecke: 714, August 24th.
Mr. Gearin: 714.
The Witness: I have two pictures of this one before, and here is one that is after. The first picture shows the——
Mr. Denecke: 25-A?
Mr. Powers: 25-B.
The Witness: The cut that is showed to our bottom and to our right, we can see the railroad track of the Southern Pacific line, and we can see these here are the rails. We can see that there were three or four feet of dirt has been hauled in and placed on top of the railroad track.

Now, we drilled this rock with lifters from down below, and at the spots shown here and ending off up here (indicating), this cut was supposed to have been cut out like that when it was shot, and then the slab was to have been taken out, and under this program we had figured that there would not be enough weight on this with that covering the entire railroad so that the rock would fall on the track and do any excessive damage.

Q. (By Mr. Denecke): Mr. Lind, see if you can mark on that with a pen there how much that you took out.

A. I think it would come out about like that (drawing on photograph). This, in fact, is finished road down here, so your deal would be down like that about 20 feet. Well, as you can see here, this tree is this same tree after the shot. This is the top of it right here, and the top of this tree that you see here is this tree sitting over here. This broke back. According to the Bureau of Engineers, we took

out about 12,000 more yards, more material in back out of this than was originally designed to come out, yet, at no time,—our shots were all examined by the government—we did not shoot any dynamite shots beyond the toe of our slope. This all up here came out of its own free will. You can see these enormous boulders here.

There is a man on them. That thing is probably almost 75 to 100 feet square and 30 to 40 feet deep. That in itself came from clear up here in the mountain.

The Court: How far away from the place where you did the shooting?

The Witness: Well, it is above the shooting. We took the bottom out. We were attempting to take the bottom out, and then, as you can see, all of this rock up here came down. The two pictures are taken pretty much from the same angle. There are big boulders laying up in here.

The Court: You did not intend that the boulders would come down at all?

The Witness: Neither did the government engineers. This is staked only to come to here (indicating), and this slab to come off, but when there is a fault in here—the picture of that fault was taken previous to the shooting, not that we knew that it was going to bust that far, but we took the picture of that fault so we could show the Army Engineers. This is the rock in question here, and there is that small seam that ran under here. Now, we are asked to take it down like that (indicating). That is the way it was staked, but when we shook this a little bit, this whole mass came down. It was not anticipated, no."

As illustrative of the second category, and referring in particular to Station 668, Mr. Lind testified (Transcript 98):

"This damage was caused by a falling snag. This snag fell as a result of falling another tree next to

it. In other words, when we fall, do clearing and falling timber, if you fall a tree, if one tree happens to hit another one, a snag, why, the snag may fall, probably will.

The Court: Did that?

The Witness: That in turn went down on the railroad track.

The Court: And damaged the railroad track?

The Witness: And damaged the railroad track. As they go endo, they will go down, hit the rail, tear out a place, is what happened. * * *"

Again referring to Station 708 October 2nd, Mr. Lind testified (Transcript 97-98):

"The Witness: October 2, 708, this was caused by rock falling off the shovel and falling on the track. When we say rolling off the shovel, we mean that we pick up a rock, and you swing around to load it in the truck, and if it rolls off the teeth, and when we say rolling off the shovel, we mean it rolls off the bucket, and it is liable to fall into the truck, and it happens quite often he busts the truck, and it is just like—most of these big rocks were balanced on the end of your teeth as you load it, and if they fall off the shovel bucket, why, they do damage."

As illustrative of the third category, Exhibit No. 28, referring to Station 694, indicates:

"At this particular point, the old and the new road were on the same level. There was loose rock from the construction of the old road in this location, and very small shots on the new road construction caused some of this loose rock to go over the edge and fall on the track. Some of this loose rock carried larger boulders down with it. Although it was expected that some rock would fall on the track at this point, the track was not blanketed as it was not expected that any boulders of sufficient size to hurt the track would be carried down on it."

There has been considerable litigation in the past few years involving the meaning of the words "caused by accident" as used in an insurance policy. In 7 Appleman Insurance Law and Practice, Section 4492, the author states:

> "When used without restriction or qualification in an insurance contract, the term accident has been held broader than the strict definition of an event happening suddenly and violently. Where there is no direct evidence as to the cause of the injury, it is regarded as accidental. The mere violation by a workman of some instruction as to place of work would not change a resulting accident to an intentional act. Injuries resulting from ordinary negligence are considered to have been accidental, as has been the case even though gross negligence was shown where there was no actual intent to injure. Use of coarse language which causes fight and resulting injury is not considered to be wilful in its nature.
>
> "The state of will of the person by whose agency injury is caused has been held determinative of whether or not the injury was accidental within the meaning of a policy of liability insurance. This rule has not been unanimously accepted, however, it is being considered elsewhere that the injury shall be considered from the point of view of the victim, and if it was accidental from his point of view, the loss is covered. When such acts are construed from the viewpoint of the actor, if they show only negligence and not wilful intent to inflict injury, the insurer is liable."

In *Springfield T. P. et al. v. Indemnity Ins. Co. of America* (1949 Pa.), 64 Atl. (2d) 761, the action was in assumpsit by the plaintiff against the defendant on a contractor's liability policy to recover costs and counsel

fees expended in the defense of five proceedings for property damage claims resulting from blasting in construction of a sewer. There was a judgment for the plaintiffs and the defendant appealed.

In affirming the lower Court, the Supreme Court of Pennsylvania stated:

> "Defendant conceded that the terms of the policy required it to defend trespass actions, alleging negligence which the abutting property owners initially instituted and later discontinued but contended that it was not required to defend the five proceedings for the same damages, on the ground that the damages 'accidentally suffered' are not recoverable in such proceedings, recovery being limited by law to damages which are the necessary and unavoidable consequences of the nonnegligent exercise of the right of eminent domain.
>
> "With this contention we cannot agree. It assumes, erroneonsly, that the terms 'negligence' and 'accident' are synonymous. Such, however, is not the case. * * * 'Accident', and its synonyms, 'casaulty' and 'misfortune' may proceed or result from negligence, or other cause known, or unknown."

The Court continued:

> "Petitions in the five proceedings alleged that Appelees 'caused large charges of dynamite and/or other material to be exploded for the purpose of removing rock as the work progressed; that as a result of the blasting operations large quantities of dirt and rocks were thrown' on petitioners' properties and 'that concussions and vibrations caused by the aforesaid blasting in the construction of said sewer caused great damage' to petitioners' buildings.
> "As pointed out by the Court below 'There is nothing in any of the petitions to indicate that the injury complained of was foreseen or expected, or designed or intended. Prima facie, the injury was "*an unusual*

> *effect of a known cause",* and, hence, "accidentally suffered".'
>
> "Moreover, the appellant recognized that the terms of the policy were broad enough to include damages to abutting premises as a result of blasting, by eliminating from 'Exclusions' structural injury to any building or structure adjacent to the insured premises due to * * * excavations below the natural surface of the ground or due to blasting therein or thereon." (Italics supplied)

The Court stated that the insurers ultimate liability to pay damages was not before it, but it nevertheless adopted the following definition of "accident":

> "An accident is an occurrence which proceeds from unknown cause, or which is an unusual effect of a known cause, and hence unexpected and unforeseen."

In *Larsen v. General Casualty Company of Wisconsin* (Minn.), 99 Fed. Supp. 300, the plaintiff had purchased from the defendant a manufacturers and contractors liability policy. The plaintiff was in the business of servicing and repairing oil burners. An employee of the plaintiff working at a customer's home negligently reassembled the connection between the furnace door and the oil burner and oil leaked out and a fire ensued.

The property owner's fire insurance carrier paid for the damage and then as subrogee sued the plaintiff. Defense of the case was tendered to the defendant and refused. A judgment was obtained by the Home Insurance Company, the subrogee, against the plaintiff, and then plaintiff sued its insurer to recover the amount of the judgment plus costs and attorneys' fees.

The policy in question contained a similar clause to that in policy LCX 2708 (Exhibit #2) and it was the contention of the defendant that there was no "accident" and therefore no coverage under the policy.

The Court held in affirming judgment for the plaintiff:

> "There is no limitation or restriction in the policy with reference to the use of the word 'accident'. Consequently, there is no occasion to employ the narrow or restricted interpretation or understanding of that term. * * * The fire was an occurrence or mishap unintentionally caused and commenced within the plain intendment of the policy as the term 'accident" broad and unrestricted is used therein."

Generally the Courts have been called upon to determine the meaning of the phrase "caused by accident" in those cases where personal injury has been suffered as a result of an assault and battery. By the great weight of authority injuries resulting from assault and battery are "accidental" within the provisions of a liability policy.

New Amsterdam Casualty Company v. Jones (Mich.), 135 F. (2d) 191.

Huntington Cab Co. v. American Fidelity & Casualty Co. (W. Va.), 155 F. (2d) 117.

Maryland Casualty Company v. Baker (Ky.), 200 S.W. (2d) 757.

Archer Ballroom Co. of Nebraska v. Great Lakes Casualty Co. (Wis.), 295 N.W. 702.

Cordon v. Indemnity Insurance Co. of America (Ohio), 123 F. (2d) 363.

Rothman v. Metropolitan Casualty Co., 16 N.E. (2d) 417, 117 A.L.R. 1169, 1175.

Mr. Stuart Leavy, the agent for the Hartford Accident & Indemnity Company who wrote the policy in question for the appellants stated (Transcript 255):

> "On the property damage, that is damage to property of others which occurs through accidental injury. It must be something unexpected, not anticipated at the time the event occurs which caused this unexpected or accidental injury."

Again Mr. Leavy in answering the Court's question as to the frequency of a particular happening testified (Transcript 259):

> "If it was beyond their expectations or that which the contractor ordinarily would expect. We have those cases come up quite frequently in connection with blasting, and our contractor puts a blast in where he thinks it is going to react within a certain area, and it goes beyond that, and it shakes down plaster and homes and so forth, and then we have property damage claims which we pay."

The law in this particular field is summarized in a paper presented before the Society of Chartered Property & Casualty Underwriters on June 29, 1949 and written by Bernard MacManus, Jr. and Robert Williams to be as follows:

> "Supported by the Case Law and Statutes examined, sheer logic glaringly points from these premises to the conclusion that *if the damages were not wilfully intended or wilfully inflicted, then the damages must have been fortuitous, unforeseen, untoward and unexpected; i.e. they were caused by accident.*
>
> "As no liability policy may cover damages wilfully inflicted or wilfully intended, the only possible conclusion to be drawn is that a liability policy on a 'caused by accident' basis is no less inclusive as to

coverage than one on the 'occurrence' basis. In this one respect, one policy form will do no more, insurance wise, than the other, and there is accordingly no distinction between them." (Italics supplied)

The authors discussed "operational damages" and give as an example the situation where a licensed hauler's heavy equipment regularly and frequently moves over sidewalks. In such instances the sidewalks give away on occasions and the authors state:

"Particularly as respect claims of this caliber there seems to be considerable disagreement as to whether such a casualty was so unexpected and fortuitous as to bring it within the scope of liability insured damages 'caused by accident'. In every such situation, however, there enters the matter of judgment, particularly the judgment of the operator of the vehicle, or the one in charge or responsible. *Such a judgment may be negligently formed, may be thoughtless, careless, or even irresponsible. But in the absence of admitted knowledge of expected results and of expected damages, of a nature sufficient to justify the imposition of liability, based on intent to inflict, the claim is one of damages 'caused by accident'.*" (Italics supplied)

The authors state that such claims are within the policy coverage unless there is proof of an act of wilful damage and that

"In the absence of such proof operation damages are within the scope of coverage of liability policies whether written on a 'caused by accident' or 'occurrence' basis, * * *."

Although there has been considerable litigation relative to personal injury on the phrase "caused by accident" there have been few cases involving property damage claims.

The case of *Cross et al. v. Zurich General Accident & Liability Insurance Co.* (C.C.A. 7th), 184 F. (2d) 609, decided October 19, 1950, was a property damage case and involved a factual situation almost identical to some of the instances when damages were sustained to the track and property of the Southern Pacific. In that case the Public Liability Policy provided:

> "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury * * * property * * * *caused by accidents* which occur during the policy period * * *." (Italics supplied)

The plaintiffs were engaged in the business of cleaning the exterior of buildings. Their usual method of cleaning the buildings was not too successful and so they obtained permission from the managers of the buildings to use a solution compounded of one cup of hydrofluoric acid to five gallon bucket of muretic acid solution. After the solution had been applied it was then washed off the masonry with a jet of wet steam. The plaintiffs knew that the hydrofluoric acid had the property of marking or etching glass, and therefore to avoid acid damage to the windows adjoining the area being cleaned they adopted the following protective procedure. Before and during the application of the solution to the walls, and while the solution was being washed off a jet of steam water or wet steam was played upon the windows. Nevertheless, some of the glass in the windows of the building was damaged by the solution which had been used and claims for damages were received by the

plaintiffs from some of the tenants and from the agents of the building.

The insurance company denied the claims, stating that the damage was not occasioned by an accident and then the plaintiffs brought suit against the insurance carrier for a declaratory judgment. The District Court held that the damage to the windows which gave rise to the claims against the plaintiff was not "caused by accident".

In sustaining the contention of the plaintiffs, on appeal, that damages were "caused by accident" the Appellate Court stated:

> "The basis for the decision of the trial court was that plaintiffs intentionally used hydrofluoric acid in the solution and failed to take precautions of covering the windows with grease or heavy paper. But failure to make a proper or effective precaution does not prove intent to damage. Plaintiffs may have been negligent in not keeping sufficient water on the windows, but the very fact that the water was applied to each window negatives any idea that plaintiffs intended to damage same. *And lacking such intent the damage was accidental, even though caused by negligence.* The insured bought and paid for protection against liability for negligent acts. *A policy such as here under consideration covers the risks incidental to the occupation in which the insured is engaged.* It is well settled that negligence on the part of the insured which causes or contributes to the injury or damages is not a defense." (Italics supplied)

The testimony of Mr. Lind supplemented by Exhibit 28 shows that on a number of occasions the appellants were aware that blasting would cause rocks to be thrown on to the track and in order to obviate and cut down

any possible damage to the track or roadbed the appellants blanketed it with approximately four feet of earth. In the *Cross* case supra, the plaintiffs knew that the solution used would mar and scratch the windows but preventative measures were taken and although they proved to be unsuccessful nevertheless the damage incurred was "caused by accident". Although it may be urged that the appellants did not blanket the tracks with sufficient earth, "the very fact that the tracks were blanketed negatives any idea that the appellants intended to damage same." And lacking such intent the damage was accidental even though caused possibly by negligence.

In *Koch v. Ocean Accident and Guarantee Corp. Ltd.,* 313 Ky. 220, 230 S.W. (2d) 893, the plaintiff, a general contractor, had contracted to repair a church building which had been damaged by fire. In making the repairs the employees of the plaintiff joined a floor joist to a wooden header which replaced a wooden header that had been destroyed by the fire. The employees of the plaintiff installed the new header so that it was placed in contact with the breast of the chimney of the church and later when a fire was built in the furnace it ignited the wooden header causing a second fire which damaged the church. It was the contention of the plaintiff that the second fire which damaged the church was an accident within the meaning of the policy which provided "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed up him by law for damages because of injury to or destruction of property, including the

loss and use thereof, *caused by accident* and arising out of the hazards hereinafter defined." (Italics supplied.) The insurance company contended it was not an accident within the meaning of the policy and that the policy was not one to indemnity the insured against loss arising out of the incompetency of his employees in designing or making repairs to the property which created a fire hazard and that it was not a policy to indemnity the insured against loss arising out of a claim based upon defective workmanship, design or materials. The Court of Appeals in reversing judgment in favor of the insurer held:

> "The most that can be said in favor of the contention of the insurer is that the language of the policy is susceptible of two interpretations, one of which would result in its liability, the other in its exemption from liability."

The Court then stated that where the language in an insurance contract is ambiguous or that there is doubt of uncertainty as to its meaning the one favorable to the insured and the other favorable to the insurer the former will be adopted.

Surely it cannot be contended that where a large boulder slips out from the claws of a shovel and falls on the railroad track that an accident did not occur. In such an instance it is the obvious intention of the appellants to lift the boulder into a truck and the fact that it falls and hits the railroad track is certainly unexpected and unintentional and unforeseen. It was an accident in the truest sense of the word. The same can be said on those occasions when snags fell on to the railroad

track because of being dislodged by springing or drilling or equipment movement in the immediate area or due to the fact that another snag was felled which struck another causing it to fall on to the railroad track. In those cases where ravelling occurred it certainly was unanticipated as far as appellants were concerned and when the operations of the appellants caused this "ravel" surely it cannot be contended that it was anything but unexpected, unforeseen and unanticipated.

It is submitted that in all instances where the track or roadbed of the Southern Pacific Company sustained damage an accident occurred both from the viewpoint of the appellants and the Southern Pacific Company in that an *undesigned unforeseen and unexpected mishap* occurred resulting in injury to a person or damage to a thing. There is nothing in the evidence to indicate that the damages were wilfully intended or wilfully inflicted, in fact the contrary appears from all the evidence, and thus the damages must have been fortuitous, unforeseen, untoward and unexpected, i.e. they were caused by accident.

It is said that "accidents will happen" and the fact that they may occur in some instances more than others does not make them any the less accidents.

Over a period of about two years accidents occurred as a result of the appellants' operations under contract 24-A2 (Exhibit #1) and though these accidents may, to some extent, be factually similar, they were nevertheless separate, distinct incidents, each constituting a separate accident within the terms of the policy.

SECOND SPECIFICATION OF ERROR

The trial court erred in concluding that the appellee was not required under the relevant policy of insurance to appear and defend on behalf of the appellants against actions or claims brought against the appellant by the Southern Pacific Company for damages resulting from appellants' roadbuilding operations for the reason that the counterclaim of the Southern Pacific Company as asserted against the appellants was clearly within the policy coverage.

Argument, Point I

Paragraphs 2 and 2(a) of the Contentions of the Southern Pacific Company as set out in the pre-trial order read (Transcript 32 and 33):

> "Plaintiffs' *operation were negligently or intentionally conducted* and the damages sustained by Southern Pacific Company were occasioned solely and proximately by the aforesaid conduct on the part of the plaintiffs.
>
> "(a) As a corollary to contention No. 2 it is the position of Defendant Southern Pacific Company that by reason of blasting by the plaintiffs, *absolute liability is imposed regardless of whether the damages resulted from the negligent or intentional conduct on the part of the plaintiffs.*" (Italics supplied)

Policy LCX 2708 (Exhibit #2) provides in part:

> "As respects such insurance as is afforded by the other terms of this policy, the company shall (a) *defend in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof,*

even if such suit is groundless, false or fraudulent. * * *." (Italics supplied)

Generally the liability of an insured to defend an action and pay the resulting judgment is measured by the allegations of the complaint.

As to the duty of the insurer to defend, the comment at 8 Appleman Insurance Law and Practice at Section 4683 is generally recognized to state the weight of authority:

> "*An insurer's duty to defend an action against the insured is measured by the allegations in plaintiff's pleading* * * * or, as some courts have expressed it, the language of the policy and the allegations of the complaint must be construed to determine the insurer's obligations * * *.
>
> "The nature of the claim against the insured rather than the details of the accident determine whether the insurer is required to defend. And it has been held that the insurer's obligations is to be determined when the action is brought and not by the outcome of the action * * *.
>
> "On the other hand, an insurer cannot be called upon to defend a suit against the insured, where the petition or complaint upon its face alleges a state of facts excluded from the policy." (Italics supplied)

This Court recently had occasion to rule on the obligation of the insurer to defend in the case of *Journal Publishing Co. v. General Casualty Company* (C.C.A. 9th), 210 F. (2d) 202, decided January 15, 1954. In that case an original action had been filed by Perton in the State Court against the Journal Publishing Company in which he alleged that at the time of his injury he was in the employment of The Journal. The General Casualty

Company refused to defend the action on the ground that the facts alleged in the complaint showed no coverage under its policy. The Journal Publishing Company eventually settled the action brought against it by Perton and then commenced action against General Casualty Company to recover for the amount paid to Perton and for its defense costs and expenses.

This Court reviewed many cases upholding the obligation of the insurer to defend and concluded:

> "We hold therefore that even *although it may be considered that the pertinent complaint stated a case necessarily outside of the policy coverage, and that in consequence when this complaint was handed to General it owed no duty to defend,* yet we think that a policy of this kind will not stand a construction which would permit General to escape its obligation under paragraph 1 merely because of an allegation of employment made by a third party claimant for whose acts and allegations the insured can hardly be held responsible. The contract drawn and sold by it ought not thus to be construed so strongly in its own favor. One of the outstanding facts of modern litigation is the diminishing importance of initial pleadings in the light of the ease of amendment and the use of pre-trial proceedings to lay the pleadings on the shelf. This plasticity of modern pleading was alluded to in Lee v. Aetna Casualty Insurance Co. (C.C.A. 2d) 178 F. 2d 750, where the Court seems to suggest that if an initial pleading were later amended to disclose for the first time a case within the policy, the insurer might then have to take over the defense. We are not confronted with that situation here, but we think that the considerations there mentioned are additional reasons why the Court below was in error in assuming that the question of liability not only under paragraph 2 but under paragraph 1 as well, can be

CONCLUSION

The appellants respectfully submit that the Findings of Fact and Conclusions of Law of the Trial Court are clearly erroneous and that the damages sustained on the tracks and roadbed of the Southern Pacific Company resulted from the construction operations of the appellants and were "caused by accident" as that term is used in the policy; that the appellee was obligated to defend the appellants against the counterclaim asserted by the Southern Pacific Company as the counterclaim as alleged in the contentions of the Southern Pacific Company in the pre-trial order was clearly within the policy coverage irrespective of whether or not it was later determined that the damages so asserted by the Southern Pacific Company in the counterclaim were not caused by accident.

Respectfully submitted,

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Attorneys for Appellants.

No. 14415

United States
Court of Appeals
For the Ninth Circuit

HENRY A. KUCKENBERG, HARRIET KUCKENBERG, and LAWRENCE KUCKENBERG, Doing Business As KUCKENBERG CONSTRUCTION CO.,

Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation,

Appellee.

Appellee's Brief

Appeal from the United States District Court
For the District of Oregon.

James Arthur Powers,
1935 S. W. 12th Avenue,
Portland 1, Oregon,
Attorney for Appellee.

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In the beginning the United States Public Roads Administration arranged to relocate an old mountain road which originally was part of the north branch of the Santiam Pass which crosses the Cascade Mountain Range in Oregon. A portion of the old road was to be relocated upon the side of a mountain ravine. The Southern Pacific Company had a branch line at the bottom of the ravine paralleling a river at some points; it was anticipated that damage would be done to the railroad, and provisions were made in the contract with respect to preventing damage and interference with the operation of trains as far as possible. At two points especially, where expense items were incurred by the appellants for repairing the track and roadbed, damage was felt to be unavoidable because of the precipitous mountain side which was sharply beyond the angle of repose.

At the principal points where the damage occurred, the contractors used the railroad tracks and roadbed as a detour for vehicular traffic and built planking over it. The blasting on the side of the mountain caused rocks and other debris to continue to fall on the track, and the contractors in their operation kept a bulldozer and other equipment along this detour in order to push the debris off the roadbed. This material falling or rolling onto the track would be shoved off, generally into the river paralleling the roadbed. Rails and ties

and other materials were kept on hand to repair the track in order to keep the railroad in operation. Part of the contract price was to cover such damage and the cost of keeping the track free from debris, and the appellants agreed to pay for all damage to the track and roadbed of the railroad. The pertinent portions from the bid proposal and contract covering these matters follow:

Exhibit No. 1, p. D-4—

> "Contractor shall protect Railroad against damage to telegraph, telephone and signal lines (including telegraph and telephone lines of The Western Union Telegraph Company located upon railroad right of way), roadbed, ballast, ties, and/or track. Any work of this character which railroad may be required to do on account of or for the purpose of accommodating the work of Contractor shall be done by Railroad at the expense of Contractor, and Contractor shall reimburse Railroad upon rendition of bills therefor for all expense incurred by it in: (a) repairing damage to railroad structures, telephone, telegraph and signal lines (including telephone and telegraph lines of The Western Union Telegraph Company located upon Railroad property) and (b) repairing damage to roadbed, ballast, ties and/or track."

Exhibit No. 1, p. D-6—

> "Between Stations 691-85 and 714-50, Unit B, the roadway excavation involved is in such close proximity to the railway company tracks that some

interference with the continuous operation of the railroad and possible damage to its facilities would seem to be unavoidable. At this or any other points where similar conditions exist the contractor shall keep the engineer and the railway company fully informed of his plans and shall cooperate in their modification and execution to the end that such unavoidable interference and/or damage may be held to a minimum. Railroad operation shall be restored at the earliest practicable moment either by temporary shoofly construction or by restoration of the now existing condition. Any damages or costs involved which result from such construction operations shall be at the expense and responsibility of the contractor."

(p. D-9) Protection of Railroad and Existing Highway During Construction—

"Construction shall be performed by methods which will result in the least possible damage to the adjacent railroad and to the existing road. **Blasting** shall be done in such manner that the materials will, so far as practicable, remain in place within the proposed road prism. **Any** materials or debris falling onto **either facility** shall be removed, and any damage to the roadbed or track immediately corrected. Broken rail, damaged ties and fouled ballast shall be replaced in a workmanlike manner. A stock of ties, rail, telephone and telegraph line and supplementary supplies shall be kept in stock on the project at all times to facilitate repairs."

"The contract unit price shall include full compensation for all special work necessary in blast-

ing and excavation of the material to prevent damage to the railroad and any work necessary in removing debris unavoidably dropped on the roadbeds of the railroad and existing highway and for the correction of any damages to those facilities or to the telephone and telegraph lines."

During the summer of 1947 when the anticipated damage began to occur under the foregoing provision of the contract the railroad company made the repairs and billed the appellant contractors in accordance with the foregoing provision. Thereafter the railroad and the contractors entered into an agreement at the request of the contractors whereby the contractors with their own equipment on the job would repair the damage as it occurred, and this is what was done. Long after, there was a long list of items covering the cost of appellants' operations in repairing damage and keeping track clear furnished to the insurance company by the appellant contractors which they later claimed were caused by accident. Appellee insurance contracts issued to appellants were in effect from May 14, 1948, to July 29, 1948. On July 6, 1948, it was reported to appellee that these bills were being presented ". . . in anticipation of offset against any future claims which the Southern Pacific might bring against Kuckenberg. Mister Souther advises there is no thought of litigation in the minds of either Kuckenberg or himself as respects Hartford contracts." (R. 276. Def's Exhibit 117).

Appellants and S. P. Company were having a controversy over this same account and whether some items of track damage on it (**not** occurring from appellants' operations) had been repaired for S. P. Company by appellants. Finally appellants commenced this action against both S. P. Company and appellee insurance company, to which action the S. P. Company filed its counterclaim against appellants to recover for the amount of its expenditures in repairing the early track damage. Its main contention for recovery was based on the contractual provision above. Appellee insurance company refused to defend this counterclaim for the appellants. It was the denial of this tendered defense of the counterclaim which gives rise to appellants' specification of error No. 2.

ANSWER TO SPECIFICATION OF ERROR No. 1

The Court, in finding that the damage was operational in nature and not the result of accident, was in the best position to judge the evidence and the credibility of witnesses; there was ample evidence supporting the findings and conclusions reached.

Plaintiffs' witness Lind testified there were 59 items of damage to the track within a distance of some 500 feet, all quite similar in character (R. 158), and 34

items of damage in another section of the work within a distance of 700 feet (R. 159).

Witness Struble, who was government Resident Engineer on the job, testified (R. 181-183):

"Q. In letting this contract for the construction of road was there any provision or any anticipation made for damage to the track which would occur in the operations of the contractor?

A. Not as far as we were concerned; however, we anticipated damage, and we had set up what we thought was the most difficult section, and we estimated at a higher price to take care of the additional cost of construction.

Q. Would that take care of any damage in replacing and repairing track and so on?

A. That is hard to say. I could not answer that because it depends on how much would develop.

Q. Have you had a chance to look at your notes and look at the items of damage claimed?

A. Well, I looked them over yesterday, but ——

Q. How frequently when they were in this close proximity to the track would material come down on the track? Was it a daily occurrence or otherwise?

A. It was pretty general. Throughout both the blasting and the digging of the material it was—perhaps there would be some material would come down nearly every day, and maybe some days there would not be enough to

make a great deal of difference, but probably some material was lost every day.

Q. Where would that material go to?

A. Well, it would generally go down to the railroad track.

Q. And on the track and around the track?

A. Well, sometimes it would stop there. Sometimes it would go clear over, but it would depend on the volume of the material that came down.

Q. There is a river down below part of it there?

A. The river below the railroad track.

Q. So at times some of the material was deliberately shoved down by bulldozer onto the track and another bulldozer down there shoved it off?

A. Quite frequently there was a bulldozer down there shoving it off, yes, not always, but as cuts were being opened up and there would be no chance to control the material it would spill over, and they would have a bulldozer to remove the material.

Q. That bulldozer would be kept right down there along the tracks, would it?

A. Pretty much, pretty frequent, yes.

Q. Who did you look to to remove that material and to protect the track? Whose obligation was that?

A. The contractor's obligation.

MR. POWERS: That is all."

There was only one place for the loose and blasted materials to go as the work was being carried on in two sections of the job and that was upon the track. Witness Staats testified (R.177-178):

"Q. In your inspection of the job and carrying on that, was there any way to get the rocks out other than blasting————?

A. No practical way.

Q. And moving it down? These sections that you saw, what was at the bottom? From your experience where would this rock go?

A. It would go down. It was on a hillside, it had to go down.

Q. What would it go down to; what was down there?

A. Well, the track and the river.

Q. Was there any other place it could go?

A. Well in some places there was a little of it that could hang up on a very narrow county road there. * * *

Q. Mr. Staats, what would be the natural and probable consequences of blasting on a hillside with reference to the tracks down below?

A. Part of the rock, if there was—except for the little that hung up on the county road, it would go down there.

Q. What would be the distance, the average distance between the rock that would go down below and the track itself? Would it be five

feet, ten feet, fifty or a hundred feet? Can you give us the extremes of distance there, Mr. Staats?

A. Well, in some instances it was practically a straight cliff that overhung the railroad, and in other instances it was back maybe, oh, any amount, but it is a narrow canyon."

An over-all reading of the testimony leads to the natural conclusion that these matters were operational in character and not the result of accident. This evidence, together with the contract provision that due to the close proximity of the railroad company's tracks to the excavation work to be done "that some interference with the continuous operation of the railroad and its facilities would seem to be unavoidable," and the further provision that the contrator should include in his "Bid" such anticipated damage and cost of protecting the railroad, keeping the track clear, and removing the debris could lead only to the same conclusion.

It is hard to see how the lower court could have ruled other than it did, and now that the court has made its findings there would seem to be no basis for disturbing those findings in view of Rule 52(a) of the Federal Rules of Civil Procedure:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given

to the opportunity of the trial court to judge of the credibility of the witnesses."

The law was fully briefed to the court below, and it was stated by the court after reading the briefs that he was more convinced than ever that these items of damages were not accidents. Even in the absence of such contract provision, the weight of authority supports the lower court's ruling. It was agreed by all below that if it should be held that the items of damage did not result from accident that would put an end to the case as far as appellants and appellee are concerned.

POINT A

The essential element of an accident or an injury resulting from accident is that the result is unforeseeable.

Springfield Twp. v. Indemnity Insurance Company of North America (1949) 361 Pac. 461, 64 A. 2d 761.

In this case cited by appellants, a sewer authority sued the insurance company on a contractor's liability policy to recover costs and counsel fees expended in defending action brought against it for certain property damages resulting from plaintiffs' blasting operations in the construction of a sewer. The policy insured the authority against liability for,

> "property damage accidentally suffered or alleged to have been suffered . . ."

during construction of a sewer and the insurance company agreed to defend all claims or suits for which the authority is or **is alleged** to be liable. The final holding is not in point for the court expressly held that the insurance company's **ultimate liability** to pay damages was not material to its decision. It was enough for the insurance company's obligation to defend that it be alleged that property damage accidentally occurred. Furthermore, the case does not indicate the frequency of the injuries suffered. The inference is that there were one or two acts over a short period of time as opposed to the instant case where a series of acts over a two year period produced recurring damage of the same character to the same claimant.

The court defined "accident" under a contractor's liability policy. It stated that if accident and negligence are not opposites, they could not be regarded as identical without confusing cause and effect. The court then stated: (p. 762):

> ". . . Accident, and its synonyms, casualty and misfortune, may proceed or result from negligence, or other cause known or unknown.
>
> "That which distinguishes an accident from other events is the element of being unforeseen; an accident is an occurrence which proceeds from an un-

known cause, or which is an unusual effect of a known cause, and hence unexpected and unforeseen."

The results here claimed to be accidents by appellants do not proceed from an unknown cause. The only remaining question is whether or not they can be considered the unexpected and unforeseen results or effects of a known cause. A similar inquiry arose in the case of

United States Fidelity & Guaranty Co. v. Briscoe (Okla, 1951) 239 P. 2d 754,

to which case we shall soon refer. We have found no cases in Oregon on facts similar to those here involved.

The most widely quoted general definition of accident in an insurance policy is found in

United States Mutual Accident Association v. Barry (1889) 131 U.S. 100, 9 S. Ct. 755, 33 L. Ed. 60 (p. 67, 1st col.)

". . . the term 'accident' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;' that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which pro-

duces the injury, then the injury has resulted through accidental means."

A similar definition has been adopted in Oregon.

Trevethan v. Mutual Life Insurance Co. of New York (1941) 113 P. 2d 621 166 Or. 515, (p. 525).

"The policy contains no definition of the word 'accidental.' The word, therefore, should be given its ordinary, usual and popular signification or meaning, as indicating an event which takes place without one's foresight and expectation, and is not the natural and probably consequence of an ordinary or common act, as distinguished from an event the occurrence of which involved no element of chance or unexpectedness. Couch on Insurance, section 1137. Webster's Unabridged Dict., title 'Accident,' defines the word 'accident' as 'an event which takes place without one's foresight or expectation; an event which proceeds from an unknown cause, and therefore, not expected; chance, casualty, contingency.' The word 'accident' has also been defined as any event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual and unexpected to whom it happened, and took place without the concurrence of the will of the person by whose agency it was caused."

This definition was quoted and approved in

Seater v. Pennsylvania Mutual Life Insurance Co. of Philadelphia (1945) 176 Or. 542, 156 P. 2d 386, 391.

It should be noted that the definitions in the above U. S. Supreme Court and Oregon cases are for accident insurance policies and not liability insurance policies.

POINT B

Injuries resulting from similar acts substantially repeated over a period of time are not accidents.

United States Fidelity & Guaranty Co. v. Briscoe (Okla., 1951) 239 P. 2d 754.

Contractor entered into a contract with the State of Oklahoma to construct 12 miles of cement highway. Part of the operation involved unloading bulk cement from railroad hopper bottom cars into trucks for transportation to work sites. A temporary unloading plant was constructed for this purpose and numerous precautions were taken to prevent the escape of the dry, powdered cement. Soon after commencing operations, a neighboring family complained that the cement dust was escaping from the unloading mill, impregnating the air and causing personal and property injuries. The operations continued and the family brought actions against the contractor who tendered their defense to the insurance company on a liability policy by which the insurance company contracted to insure contractor against liability for injuries to persons or to property "caused by accident." Contractor then brought this

action against the insurance company. In reversing the trial court and remanding the cause with directions to dismiss, the state supreme court stated:

> "Coming then to the question whether there is, in this record, any testimony tending to show that damages to members of the Taylor family were caused by accident, we confront again the troublesome inquiry: What is an accident? And, when is a means or cause accidental, within the meaning of the contract? It is not always easy to define a word, though one of familiar, common and daily use, in other words or terms, which shall, at once, be so clear, accurate and comprehensive, as to be everywhere and always applicable. Attempts to accomplish such a definition quite as often serve to confuse, as to elucidate. One thing, at least, is well settled, the words, 'accident' and 'accidental' have never acquired any technical meaning in law, and when used in an insurance contract, they are to be construed and considered according to common speech and common usage of people generally. Certain it is that no attempt to define these words, in other terms, is, in any respect, an improvement upon the definition found in our standard lexicons, and from these, by way of illustration, we quote from Webster's International Dictionary:
>
> 'Accident. An event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event, chance, contingency.'
>
> 'Accidental' means Happening by chance or

unexpectedly, Undesigned; unintentional; unforeseen, or unpremeditated.'

This is also the meaning, given to these words in United States Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60. It is an event from an unknown cause, or an unexpected event from a known cause." (p. 756, 2d col., middle).

"In an etymological sense, anything that happens may be said to be an accident, and, in this sense, the word has been defined as befalling; a happening; an incident; an occurence or event. It is true that if contractor performs or does a voluntary act, the natural, usual, and to-be-expected result of which is to bring injury or damage upon himself, then resulting damage, so occurring, is not an accident, in any sense of the word, legal or colloquial." (p. 757, 1st col., bottom).

"Taking into consideration all of the facts and circumstances, we are of the opinion, and so hold, that the claims asserted against contractor were not predicated on, or caused by accident, and not within the coverage of insurance policy, sued upon. They were predicated upon a series of acts, which continued approximately four months, and, at all times, voluntary, intentional, tortious and wrongful, resulting from negligent conduct of contractor." (p. 758, 2d col., top).

In that case, the insured began a course of action when injuries to neighboring area should have been anticipated and continued the same course of action

for a considerable period after injuries resulted and were brought to the attention of the contractor. In the instant case, the language of the bid proposal brought the probability of damage to the attention of appellants and in addition, appellants, as experienced road-building contractors, should be held to have known of the probable results of blasting operations.

C. Y. Thomason Co. v. Lumbermens Mutual Casualty Co. (CA, 4th, 1950) 183 F. 2d 729.

Contractor contracted to build a highway for the South Carolina Highway Department and agreed to hold harmless the county, state, city of Florence and the state highway department. It obtained a policy of insurance against accidents. Contractor excavated the area in front of a garage, a place of business, owned by one Turner in the City of Florence. The excavation was left open for about a year. During this time and as a result of the excavation, earth was washed into the garage, water flowed into the area and Turner's business and property were substantially injured. Turner filed action against the contractor who called upon his insurer to defend. Insurer refused and brought this declaratory judgment action to determine its liability under the contract.

In affirming the trial court and holding the injuries

to Turner not to be accidents, the court stated. (p. 732, 2nd col., bottom):

> ". . . the contractor's actions that interfered with the business of the garage . . . were intentional, deliberate, long continued and unnecessary, consisting perhaps of negligence but devoid of any suggestion of accident.
>
> ". . . We are not confronted with the difficult problem of distinguishing between an accidental cause and an accidental result which sometimes arises when an unfortunate and unexpected event occurs and it becomes necessary to determine whether the cause or the result of the occurrence was accidental. In our case, neither the means nor the result was accidental, since the acts which caused the damage were persistently and continuously done and the results were the normal consequences of the acts."

The above language precisely fits the actions of appellants herein. Frequent and continued acts of the same essential nature with knowledge of their injurious consequences are directly opposed to a finding that the results were "caused by accident."

Neale Construction Co. v. United States Fidelity & Guaranty Co. (CA, 10th, 1952) 199 F. 2d 591.

Contractor contracted with a telephone company and an electric company to perform certain work in Texas on the telephone system. Actions filed against contractor alleged essentially that the contractor had

performed its work negligently and in an improper manner. Contractor notified its liability insurance company to come in and defend. The insurance company refused. Trial resulted in judgment against contractor which brought this action against the insurance company. It was conceded that liability of the insurance company would be predicated on the determination as to whether the damage was caused by accident. In affirming judgment of the trial court in favor of the defendant insurance company, the court held: (p. 593, 1st col., top):

> "The term 'accident' as used in policies of insurance has been variously defined. A good definition is found in Gilliland v. Ash Grove Lime & Portland Cement Co., 104 Kan. 771, 189 P. 793, 794, as follows: **'An "accident" is simply an undesigned, sudden and unexpected event,** usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force.' The natural and ordinary consequences of a negligent act do not constitute an accident. If one negligently erects a roof by the use of weak or inadequate rafters, the roof is liable to collapse but its fall is not an accident because such is the ordinary result of such construction. Here certain standards were required for these installations. Because of the negligent manner in which the wires were spun certain damage resulted, such as permitting the cables to sag and even creating the hazards of broken spinning wires, but these results were the usual, ordinary and expected results of such negli-

gent construction. Such results were in no sense sudden, unexpected or unanticipated. When the means used and intended to be used produces results which are their natural and probable consequences, there has been no accident although such results may not have been intended or anticipated."

As in the above case, it is submitted that the damages resulting from appellants' operations were in no sense sudden, unexpected or unanticipated. The means used under the circumstances produced results which were their natural and probable consequences.

See also,

Langford Electric Co., Inc., v. Employers Mutual Indemnity Corp., 210 Minn. 289, 297 N.W. 843.

POINT C

One engaging in blasting operations in the course of regular business is held to know or to foresee that injury to closely adjacent property will result.

It needs no lengthy citation of authority to support the proposition that the act of blasting raises a high degree of certainty that certain injuries to property in the neighboring area will be caused by falling rock and debris.

It is for this reason that the rule has been established that blasting is an inherently dangerous opera-

tion and is conducted subject to the obligation to pay damages for any injury inflicted by the blasting.

35 Corpus Juris Secundum 238 (Explosives, sec 8.a)

"One lawfully engaged in blasting operations is, according to the weight of authority, liable without regard to the question of whether or not he has been negligent, where by his acts in casting rocks or other debris on adjoining or neighboring premises or highways he causes direct injury or damage to property or causes direct injury or damage to persons thereon. He is also, under the rule more generally adopted, liable for consequential injuries occasioned by concussion or vibration to property or persons; nor is the rule restricted in application to instances where the blasting is a nuisance per se or where the property is contiguous or adjoining."

To the same effect, see

22 American Jurisprudence 175-182,

which authority, after defining the duty of a person using a powerful explosive in blasting, states as follows: (p. 175):

"Moreover, such a person is charged with knowledge of any fact in reference to the actual effect of a powerful explosive that he could by resonable diligence have ascertained."

See, also,

35 American Law Reports 1244.

The prospect of injury to railroad tracks lying immediately adjacent to the downhill from the site of blasting operations must be held to have been obvious to appellants who are experienced road building contractors.

POINT D

None of the cases cited by plaintiffs finding injuries caused by "accident" involve situations where frequent injuries resulted from substantially the same cause and the continuation of a similar course of conduct after the injuries manifested themselves.

Appellants rely mainly upon:

Cross v. Zurich General Accident & Liability Insurance Co., 184 F. 2d 609.

The court held in that case that the possibility that the plaintiffs were merely negligent in failing to take sufficient precautions to prevent injury to a building by hydrofluoric acid does not prove intent to damage and concludes as follows on p. 611:

> "* * * and lacking such intent, that the damage was accidental, even though caused by negligence."

The court found that the use of steam with hydrofluoric solution was a customary method of cleaning

buildings, and the wetting of windows during the cleaning process was a customary protection against acid damage. In the case presently at issue, if there had been but one injury the Zurich case might be some authority for holding that said injury was caused by accident, but that is not the case here at issue. There were frequent injuries to adjacent property resulting from the same substantial cause, blasting, and the same course of action continued in a similar manner. While one injury under the conditions found at the time and place of the blast despite usual precautions might be regarded as being unforeseen and, therefore, "caused by accident," a series of injuries running as high as 59 separate items of damage at one area over a two year period cannot be regarded as having been caused by accident, because the prospect of damage must be regarded as being foreseen by any reasonable person in the position of appellants. In the Zurich case, had the assured building cleaning contractor continued to employ this same cleaning method in other buildings resulting in a series of similar injuries, it can hardly be seriously contended that that court would have held such injuries to be caused by accident.

In the case of **Huntington Cab Co. v. American Fidelity and Casualty Co.,** 155 F. 2d 117, an assault and battery case, the court stated:

"If the injury is caused by the insured himself or by his employee with his authority or consent, it is not accidental and so coverage is denied; but where an intentional injury is inflicted by an employee of the assured without the latter's authority or consent, it is generally held, a few decisions to the contrary, that the injury is suffered as the result of an accident within the meaning of the contract of insurance."

Appellants cite numerous authorities growing out of assault-and-battery cases. These generally hold that had the assault and battery been committed by the named insured or under his knowledge and consent no valid insurance could be written to cover such intentional harm. Possibly one exception to this is New Amsterdam Casualty Co. v. Jones, 135 F. (2d) 191.

It is thus apparent that the assault and battery cases cited bear two important distinguishing characteristics from the case at issue herein:

1. The act causing injury was committed by an employee of the named insured without any authorization, knowledge, or acquiescence of the employer. Such has **never** been contended by the appellants herein.

2. Said cases do not involve recurring acts producing similar injuries with considerable frequency.

Appellants use as an authority a quotation from the "Society of Chartered Property and Casualty Under-

writers" apparently written on June 29, 1949. We certainly cannot agree with appellants that this constitutes any law. The quoted matter is simply an expression of opinion on one side of a forum conducted by that society and has no weight either as law or as an expression of expert opinion by said society. It may be well to note that that expression of opinion must have been contrary to the general view, as the suggestion has not been followed by insurance companies; and since then and up to now this type of insurance policy continues to be written on an "accident" basis.

Respecting this point, it is respectfully submitted, the damage resulting to the railroad company's tracks and roadbed is not accidental but is operational in the truest sense of the word.

Appellants' bid on this contract was based upon an expectation of such damage which was also within the contemplation of the other interested parties, as evidenced by the Proposal and Contract previously referred to. Appellants were awarded the contract and entered into the required agreement with Southern Pacific Company to reimburse them for any and all damages thereby caused. Thereafter appellants commenced operations, observed the injurious results of their activities and continued to blast.

The results of the continued operations with knowl-

edge of the inevitable consequences could not be said to have been "caused by accident."

ANSWER TO SPECIFICATION OF ERROR No. 2
ARGUMENT

The appellants in filing their action against Southern Pacific Company and also against appellee as co-defendants were actually trying to avoid their obligation to pay the railroad for the damage which they had done at the beginning of the job and which under the contract they were bound to pay for. By their action appellants were attempting to work up an offset defense to Southern Pacific Company's contractual claim against them. (R. 276, Defendants' Exhibit 117).

The appellants having started the litigation, there was no duty on the part of the appellee insurance company to defend appellants respecting their contractual obligations. It was the first contention of the Southern Pacific Company that the matter arose out of a contractual obligation. (R. 32).

> "It is the contention of defendant Southern Pacific Company that all the work performed and material furnished by plaintiffs were work and materials which the plaintiffs were obligated to perform or to pay for by reason of the contracts between plaintiffs and Southern Pacific Company."

The appellee insurance company also took the posi-

tion that the matter was a contractual obligation and the appellants were liable (R. 36).

> "The Hartford agrees with the contention made by the Defendant Southern Pacific Company that the work performed and materials furnished by plaintiffs was all done pursuant to contracts between plaintiffs and Southern Pacific Company and for which the plaintiffs were expressly obligated to perform and to pay for."

The matter arose on a counterclaim which Southern Pacific Company filed in said action, and there is no obligation on the part of the appellee to defend appellants against such counterclaim. The appellants had violated the policy of insurance by suing the insurance company (R. 18) and had failed to meet the conditions of the policy respecting notice (R. 17). It borders on absurdity to contend that an insured could file an action against the insurance company in which the insurance company must defend under a denial of liability on the basis that the matter does not arise out of tort liability but under a contract, and then expect the insurance company to take an opposite position against the co-defendant. The net effect of appellants' position here would require the insurance company to take the position of both a plaintiff and a defendant in the same action, which would be manifestly ridiculous.

The cases cited by appellants are not in point and

do not support their position; they relate to actions filed against an insured and do not relate to an action such as we have here commenced by an insured.

It is respectfully submitted that the lower court's ruling was correct and should not be disturbed and that the judgment of the lower court should be affirmed.

Respectfully submitted,

JAMES ARTHUR POWERS,
Attorney for Appellee.

No. 14415

United States
COURT OF APPEALS
for the Ninth Circuit

HENRY A. KUCKENBERG, HARRIET KUCKENBERG, and LAWRENCE KUCKENBERG, Doing Business As KUCKENBERG CONSTRUCTION CO.,

Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation,

Appellee.

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court
For the District of Oregon.

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY,
ARNO H. DENECKE and KENNETH E. ROBERTS,
1001 Board of Trade Building,
Portland 4, Oregon,
Attorneys for Appellants.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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No. 14415

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Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation,

Appellee.

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court
For the District of Oregon.

REPLY TO APPELLEE'S ANSWER TO SPECIFICATION OF ERROR NO. 1

Appellee has cited and primarily relied upon three cases to substantiate its contention that the insurance company owes no liability to its insured under the liability policy issued.

United States Fidelity & Guarantee Co. v. Briscoe, 239 P. (2d) 754, (Okla. 1951) and *C. Y. Thomason Co. v. Lumbermen's Mutual Casualty Co.,* 183 F. (2d) 729 (C.C.A. 10th) are of the same nature. In both the contractor intentionally committed wrongful acts and the inevitable result was damage. In both, the wrongful acts were in the nature of nuisances. In the Briscoe case the contractor operated a cement loading mill across the street from the Taylor's, with the inevitable result, that cement dust permeated the air with resulting damage to the Taylor property. The Taylor's brought a suit sounding in nuisance against the contractor and prevailed. In the Thomason case the contractor dug a ditch in front of a commercial garage which blocked access to the garage. Of course, the damage to the garage was not considered by the Court to be caused "by accident".

The facts in these two cases are obviously not comparable to those in the instant case. Here the appellant contractor did not intentionally commit any act which would inevitably cause damage. The best proof of this is that while the appellants constantly excavated by blasting and shoveling and etc. for over a year in generally similar terrain the damage sued for was only caused on the dates stated in the testimony. For example, in October, 1947, superintendent Lind testified as follows:

> "October 8th, Station 635, at this time there was a great deal of blasting in this vicinity of these stations. Well, in that place at Station 633, there was an awful lot of rock moved. I said a hundred thousand yards of rock, which by the (37) plans

you can total it, and that is probably what it totaled up, and although we had a little railroad damage through there, occasionally a rock would roll down our roadbed, roll down and hit the railroad track, and that is what those were made up of." (Tr. pp. 98-99)

Neale Construction Co. v. United States Fidelity & Guarantee Co., 199 F. (2d) 591 (C.C.A. 10th) is the third case primarily relied upon by the appellee. In that case the insured contractor defectively performed its contract with the owner and the owner sued the contractor for failure to perform alleging as damages the owner's costs in repairing the defective work of the contractor. The Court very readily held that a liability insurance policy does not cover failure to perform a construction contract.

Appellee Hartford Accident & Indemnity Company's views of the limited scope of a liability policy are most obviously revealed in those sections of its brief concerning the construction contract of the appellee (pp. 3-5) and blasting (pp. 21-22). The appellee Hartford apparently believed that that section of the contract which required the contractor to "protect the railroad against damage" (Ex. 1, p. 4) was of great significance and set out this clause verbatim. Many leases require the lessee to protect the lessor against damage to the lessor; many timber cutting agreements require the logger to protect the timber owner against damage. Apparently appellee Hartford's contention is that such a contracting lessee or logger would have no coverage under Hartford's liability policy because of the fact that the

lessee or logger undertook such obligation is an indication that damage will occur and because there is a possibility of damage, any damage that does occur does not occur "by accident".

This contract which the appellee had for the construction of the road stated that in one section of the construction interference with the continuous operation of the railroad would seem to be unavoidable and there was possible damage to the facilities of the railroad (Ex. 1, p. 6). In this same vein appellee has pointed out "the act of blasting raises a high degree of certainty that certain injuries to property in the neighboring area will be caused by falling rock and debris" (App. Br. p. 21). The position of the appellee Hartford must be, although they do not directly so state, that if damage is possible, or the chances of damage are inherent in the operation, such as they deem in the case of blasting, their liability policy does not cover. Under the appellee Hartford Accident & Indemnity Company's view of the coverage of their liability policy persons engaged in activities coming within the purview of *Rylands v. Fletcher,* L.R. 3 H.L. 330, such as storers of water, keepers of fire, handlers of gasoline, would have no coverage because any damage caused by such occupations could not possibly be "caused by accident". The appellee has cited no cases in support of this contention and the appellants believe there are none. Instead of following the underwriting maximum that the premium should vary with the risk, the appellee Hartford apparently takes the position that if the risk is greater than they deem normal they simply afford no coverage under their liability policy.

The crux of appellee's contention is that the work required of appellant under its contract with the Bureau of Public Roads was such that the chances of damage were almost, if not completely, inevitable. Appellants freely admit that it would have been almost impossible to perform the work required of them without at sometime or someplace causing damage to the railroad. Appellants also assert as a belief that no other construction job of comparable scope could be completed without some item of damage at sometime or at someplace to adjoining property. Appellants emphatically assert that because damage, somewhere, somehow, is bound to occur does not thereby mean that such damage is not "caused by accident" within the meaning of a liability insurance policy. Yet the Trial Court held that no items of damage to the railroad track, occurring at any place, by any means, or at any time, was caused by accident. Appellants respectfuully submit that in so holding the Trial Court erred.

The essence of appellants' testimony was that work of a certain nature was carried on in certain places,—the work went on and no damage was done to the railroad track and suddenly, a rock, rocks or part of a cliff fell in such a manner as to cause damage to the track. The appellant roadbuilder knew that at sometime, someplace damage might be done to the track. The acts causing the damage were not done intentionally and they were not done with the knowledge that these particular acts were likely to cause damage.

Judicial decisions seem united in stating that "* * * the words, 'accident' and 'accidental' have never ac-

quired any technical meaning in law, and when used in an insurance contract they are to be construed and considered according to common speech and common usage of people generally". *United States Fidelity & Guarantee Co. v. Briscoe,* supra. In common speech and usage how could it be anything other than an "accident" when appellants shot, in a manner approved by the United States Engineers, and brought down in one blast 12,000 more yards of rock than either of the appellants or the engineers had planned and thus by reason of the excess quantity of rock caused damage to the track (Tr. p. 85). In common speech and usage, how could it be anything other than an accident when the appelants were drilling in an area about a quarter of a mile away from the railroad track and their drilling caused a snag to come tumbling down from a quarter of a mile and damage the track (Tr. p. 88). Yet the Trial Court held, and the appellants respectively submit erroneously, that such damages were not "caused by accident".

Common speech and usage have given to "accident" a meaning that the particular damage, or injury, was caused suddenly, was not caused intentionally, and was not done with the state of mind that believed an injury would likely or probably occur because of a particular act or omission. If the meaning of "accident" were extended beyond this, coverage under any liability policy would become a question fact; liability imposed only upon a finding of gross negligence would probably not be covered at all. Persons engaged in pursuits commonly believed to involve more hazards to others than normal

would not be covered by a liability policy such as written by the appellee Hartford. The contract which the appellee Hartford has so all embracingly captioned a "comprehensive bodily injury and property damage liability policy" would be nothing but an illusion to those most reliant on liability insurance. The appellants Kuckenberg respectfully submit that the particular acts of damage here involved were "caused by accident"; they were not intentionally caused and they were not committed under a belief that damage would likely or probably occur and respectfully submit that the Trial Court committed error in finding to the contrary.

APPELLANTS' REPLY TO APPELLEE'S ANSWER TO SPECIFICATION OF ERROR NO. 2

In attempting to answer appellants specification of error No. 2, appellee first asserted that they had no duty because Southern Pacific's counterclaim was based upon contract. This assertion is immaterial as the only issue at this stage of proceeding was whether or not the damage was caused "by accident" as stated in the Findings of Fact (Tr. p. 47). Regardless of whether the liability was based upon contract or upon tort the question still remains undecided whether the insurance coverage allegedly provided by Hartford covered obligations assumed by contract or only liability imposed by tort. Southern Pacific contended in their counterclaim that Kuckenberg was liable to Southern Pacific for the dam-

age to the track which was repaired by Southern Pacific on the basis of contract, negligence, intention, or absolute liability.

The appellee Hartford also states that it had no duty to defend the appellant Kuckenberg against the counterclaim by Southern Pacific because the appellants had violated the policy of insurance and had failed to meet the conditions of the policy. These again were facts which none of the parties, had called upon the Trial Court, at this stage of the proceedings, to determine.

Appellee also states that they have no obligation to defend because the action was brought by the insured appellants. It is believed sufficient to say that a counterclaim, as that commenced by the Southern Pacific, is of the same category as if Southern Pacific had commenced an original action against the appellants.

Appellee deemed it would have been "an absurdity" to require them to defend because their defense of the counterclaim would have been contrary to their position as a defendant in the action by the defendant Kuckenberg. The appellee could defend against the defendant Kuckenberg on any ground that it chose, but Southern Pacific chose counterclaim for damages against Kuckenberg on the grounds, among others, that the damage allegedly incurred occurred by reason, among other things, of the negligence or absolute liability, by reason of blasting, on the part of the appellant Kuckenberg. This is a claim which the appellee Hartford was bound to defend. It is the basis upon which Southern Pacific brought its claim, not the basis upon which Hartford

believed the claim should have been brought, that determined the obligation of Hartford to defend the counterclaim.

It is respectfully submitted that the Trial Court erred in concluding that the appellee was not required to appear and defend on behalf of the defendant Kuckenberg against the action or claims brought against said appellants by the Southern Pacific Company.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING,
DENECKE & KINSEY, and
KENNETH E. ROBERTS,

Attorneys for Appellants.

No. 14418

United States Court of Appeals

for the Ninth Circuit

BASILIKI ANDRE GIANNOULIAS,

Appellant,

vs.

HERMAN R. LANDON, as District Director, Immigration and Naturalization Service, Los Angeles District,

Appellee.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 46)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-28-55

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* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern District of California, Central Division

No. 15927-PH

BASILIKI ANDRE GIANNOULIAS,
Petitioner,

vs.

HERMAN R. LANDON, as District Director, Immigration and Naturalization Service, Los Angeles District, Respondent.

COMPLAINT FOR WRIT OF HABEAS CORPUS

Your petitioner, Basiliki Andre Giannoulias, respectfully represents to the Court as follows:

I.

That your petitioner is imprisoned, detained, confined and restrained of her liberty by Herman R. Landon, District Director, Immigration and Naturalization Service, Department of Justice, Los Angeles District, in violation of the laws of the United States and the Constitution thereof, and that such imprisonment, detention, confinement and restraint is illegal and unlawful.

II.

That the facts showing the illegality and unlawfulness of petitioner's imprisonment, detention, confinement and restraint are as follows, to wit: [2]

1. That petitioner is an alien, a native and citi-

zen of Greece, 41 years of age, a resident of the City of Los Angeles, State of California who was lawfully admitted into the United States for permanent residence at Miami, Florida on April 13, 1950.

2. That the imprisonment, detention, confinement and restraint of your petitioner is claimed by the aforesaid Herman R. Landon to be based upon an order of deportation issued by the Assistant Commissioner, Immigration and Naturalization Service, Washington, D. C., under date of May 23, 1952, an appeal from such order of deportation having been dismissed by the Board of Immigration Appeals in Washington, D. C., on July 9, 1953.

3. That the said order of deportation directs that petitioner be deported from the United States on the charge that she is in this country in violation of the Act of May 14, 1937 in that at the time of her entry at Miami, Florida on April 13, 1950, she was not entitled to admission upon the basis of the visa she presented for the reason that such visa was procured by fraud, in that she contracted a marriage to procure entry into the United States as an immigrant and failed or refused, after entry, to fulfill the promise for such marital agreement.

4. That the order of deportation was issued and made after hearings before officers of the Immigration and Naturalization Service at Los Angeles, California and Washington, D. C. on January 4, 1951, February 8, 1951, February 4, [3] 1952, February 7, 1952 and April 16, 1952 to show cause why petitioner should not be deported.

5. That the charge upon which the order of deportation is based is not true and no evidence of the truth of the charge was given or produced at the hearings to show cause why petitioner should not be deported from the United States.

6. That all of the evidence received as exhibits in the course of the hearings to show cause why petitioner should not be deported is in the possession of the Immigration and Naturalization Service; that petitioner, through her counsel, has requested and has been refused access to such exhibits, the details of such refusal being recited in an affidavit of her counsel, Marshall E. Kidder, which affidavit is incorporated herein and made a part hereof and styled Exhibit "A"; that the refusal to allow her counsel access to the said exhibits in the deportation hearing prevents your petitioner from determining the full extent and nature of the illegality and unlawfulness of her imprisonment, detention, confinement and restraint.

III.

That no other application for writ of habeas corpus has been made by or on behalf of petitioner, and she has exhausted her administrative remedies and has no other means of determining the illegality of her detention other than by habeas corpus proceedings.

IV.

That Herman R. Landon, District Director, Immigration and Naturalization Service, Los Angeles District, threatens and intends to deport your peti-

tioner from the United States and will do so unless restrained by this Court. [4]

Wherefore, your petitioner prays that a writ of habeas corpus issue and that Herman R. Landon as District Director of the Immigration and Naturalization Service, Los Angeles District, be required to produce the body of your petitioner before this Court so that the matter may be heard and determined as the Court shall deem just; further, that pending the hearing on the said writ of habeas corpus or upon an order to show cause why said writ should not issue, that your petitioner be released from imprisonment and confinement upon giving a suitable bond for her appearance in an amount to be fixed by order of this Court.

Dated: October 12, 1953.

/s/ BASILIKI ANDRE GIANNOULIA

/s/ FREDERICK C. DOCKWEILER,
/s/ MARSHALL E. KIDDER,
Attorneys for Petitioner. [5]

EXHIBIT "A"

AFFIDAVIT OF MARSHALL E. KIDDER

County of Los Angeles,
State of California—ss.

Marshall E. Kidder, being duly sworn, deposes and says:

1. That he is one of the attorneys representing Basiliki Andre Giannoulias in the matter of her

deportation proceedings pending before the Immigration and Naturalization Service, Department of Justice;

2. That he was duly admitted to practice law in the State of California and before the Immigration and Naturalization Service and Board of Immigration Appeals and maintains offices at 408 So. Spring Street, Los Angeles, California;

3. That on Thursday, October 8, 1953, at approximately 5:00 p.m., he proceeded to the office of the District Director, Immigration and Naturalization Service, Los Angeles, California and appeared before an officer of the Enforcement Division, namely, Henry Grattan, and entered a formal notice of appearance in behalf of Basiliki Andre Giannoulias as associate counsel;

4. That affiant then requested that he be loaned a copy of the exhibits, approximately 15 in number, received in evidence and considered in the deportation hearing of Basiliki Andre Giannoulias, or that he be allowed to peruse such exhibits in the office of the said service; further, that such exhibits were desired for the purpose of ascertaining the facts of the case for use in preparing further motions or pleadings;

5. That the said Henry Grattan procured the file relating to Basiliki Andre Giannoulias and, following an examination of it, informed affiant that the said exhibits were not contained in the file relating to Basiliki Andre Giannoulias and that no copies were [7] available for perusal by counsel; further, that it was his belief that the said exhibits were

probably in the file of the Immigration and Naturalization Service at Washington, D. C.;

6. That affiant thereupon informed the said officer that it was necessary that counsel have opportunity to peruse the exhibits and that a denial of such right would make it necessary for counsel to file a complaint for writ of habeas corpus if the Immigration and Naturalization Service continued to demand the surrender of the alien for deportation at Los Angeles, California on October 12, 1953 at 10:00 a.m.

/s/ MARSHALL E. KIDDER

Subscribed and sworn to before me this 12th day of October, 1953.

[Seal] /s/ MITCHEL MOIDEL,
Notary Public, in and for the County of Los Angeles, State of California. [8]

Duly Verified. [9]

[Endorsed]: Filed October 12, 1953.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE WHY WRIT OF HABEAS CORPUS SHOULD NOT ISSUE

Good cause appearing therefor and upon reading the verified petition herein,

It Is Hereby Ordered that Herman R. Landon, District Director, Immigration and Naturalization

Service, Los Angeles District, appear before this Court on the 19th day of October, 1953, at the hour of 10:00 a.m., to show cause, if any he has why a writ of habeas corpus should not issue herein as prayed, and that a copy of this order be served upon him.

It Is Further Ordered, pending the hearing of this order to show cause, that Basaliki Andre Giannoulias be admitted to bail in the sum of $1,000.00.

Dated: October 12, 1953.

/s/ PEIRSON M. HALL,
United States District Judge [10]

[Endorsed]: Filed October 12, 1953.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE WHY WRIT OF HABEAS CORPUS SHOULD NOT ISSUE

United States of America,
Southern District of California—ss.

Comes now Herman R. Landon, as District Director, Immigration and Naturalization Service, Los Angeles District, respondent above named, and, being first duly sworn, makes his return to petitioner's petition for writ of habeas corpus and order to show cause thereon as follows:

I.

Alleges that he had petitioner taken into custody on or about October 12, 1953, in furtherance of a warrant of deportation, duly and lawfully issued in accordance with the laws of the United States and the Constitution thereof, and that such custody was lawful and proper. However, your affiant alleges that thereafter, on or about said date, this Court did order the release of the petitioner pending a hearing of the order to show cause herein upon her posting the sum of $1,000 bail, and petitioner was so released. [11]

II.

Answering paragraph II of petitioner's complaint for writ of habeas corpus, your affiant denies that there are any facts therein showing that the custody of the petitioner taken for deportation was illegal or unlawful.

Admits the allegations contained in paragraph II, 1, except that your affiant alleges that the petitioner was not lawfully admitted into the United States, as alleged in petitioner's petition, but on the contrary alleges that at the time of entry the petitioner was not entitled to admission on the non-quota visa which she presented upon arrival for the reason that such visa was obtained through fraud, in that she contracted a marriage to procure entry into the United States as an immigrant and failed or refused, after entry, to fulfill the promise for such marital agreement.

Admits the allegations contained in paragraph II, 2 and 3, of petitioner's petition.

Admits that the order of deportation herein was issued and made after hearings before officers of the Immigration and Naturalization Service at Los Angeles, California, on January 4, 1951, February 8, 1951 and April 16, 1952, to show cause why petitioner should not be deported, as alleged by petitioner in paragraph II, 4 of her petition, but alleges that the dates of February 4 and 7, 1952, with reference to Washington, D. C., were dates upon which a deposition was taken of one John Peter Fitsos by counsel for the Immigration and Naturalization Service and counsel for the petitioner herein, which deposition is Exhibit No. 13, as will more fully appear from the administrative file attached hereto and made a part hereof.

Denies the allegations in paragraph II, 5, and alleges that there is substantial evidence of the truth of the charge, as will more fully appear from the administrative file of the Immigration and Naturalization Service attached hereto, made a part hereof and designated as Exhibit "A". That your affiant alleges that the charge was sustained and was so found by the Hearing Officer on May 7, 1952, affirmed by the Acting Assistant Commissioner of Immigration on May 23, 1952, and sustained on appeal by the Board of Immigration Appeals on July 9, 1953, all of which more fully appears from the administrative file of [12] the Immigration and Naturalization Service pertaining to the petitioner, attached hereto as Exhibit "A".

Answering paragraph II, 6 of petitioner's peti-

tion, your affiant denies that counsel for the petitioner have been refused access to the exhibits received in the course of the hearings given petitioner, and alleges that said exhibits were in the file of the Immigration and Naturalization Service at Washington, D. C., have since been procured and have been made available to petitioner's counsel. Respondent further alleges that said exhibits, made part of the record of the Immigration and Naturalization Service pertaining to the petitioner, were all put in evidence in the presence of, with the knowledge of and after examination by one Robert S. Butts, attorney for petitioner from the commencement of the hearings through the dismissal of the appeal, and that petitioner's present counsel, Marshall E. Kidder and Frederick C. Dockweiler, have been substituted into the case since the dismissal of petitioner's appeal by the Board of Immigration Appeals.

III.

Admits the allegations contained in paragraph III of petitioner's petition, except that respondent denies the alleged illegality of her detention.

IV.

Admits the allegations contained in paragraph IV of petitioner's petition, and states with regard thereto that your respondent took the petitioner into custody for the express purpose of deporting the petitioner, pursuant to the warrant of deportation heretofore issued herein.

For a Further, Separate, Second and Affirmative Defense, Respondent Alleges:

I.

That the petitioner, Basiliki Andre Giannoulias, a native and citizen of Greece, entered the United States at Miami, Florida, on the 13th day of April, 1950, as a non-quota immigrant on the basis of a marriage to a United States citizen in Nassau, Bahama Islands, on March 27, 1950. [13]

II.

That on the 15th day of November, 1950, a warrant of arrest was issued by your respondent, charging that at the time of entry the petitioner was not entitled to admission to the United States because the visa which she presented had been obtained through fraud, in that she contracted a marriage to procure entry into the United States as an immigrant and failed or refused, after entry, to fulfill her promise for such marital agreement, all of which will more fully appear from the administrative file of the Immigration and Naturalization Service attached hereto, made a part hereof and designated as Exhibit "A".

III.

That hearings on said warrant were held at Los Angeles on January 4 and February 8, 1951, and April 16, 1952.

IV.

That at the time the petitioner gained entry to the United States upon the fraudulently obtained visa there were more than six thousand persons

registered in Athens, Greece entitled to prior consideration before the petitioner because of their earlier applications for immigration visas, as will more fully appear from Exhibit No. 14 attached to said Exhibit "A" and made a part hereof.

V.

That the hearings were fair; that petitioner was represented by counsel; that petitioner was given the opportunity to show that she was not one of the class of aliens whose deportation Congress had ordered; that the warrant of deportation is based upon reasonable, substantial and probative evidence, all of which more fully appears in Exhibit "A".

Wherefore, respondent prays that petitioner's petition for writ of habeas corpus be denied, that the order to show cause be discharged, that petitioner's bond be exonerated, and that petitioner be remanded to the custody of the Attorney General for deportation.

/s/ HERMAN R. LANDON

Subscribed and sworn to before me, this 16th day of October, 1953.

/s/ MICHAEL F. GRAVE,
Deputy Clerk, U. S. District Court, Southern District of California. [14]

EXHIBIT "A"

* * * * *

United States of America, Department of Justice,
Los Angeles, Calif.

WARRANT—DEPORTATION OF ALIEN

No. A7 451 818

To: District Enforcement Officer, Los Angeles, California, or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized immigrant inspector, and upon the basis thereof, an order has been duly made that the alien Basiliki Andre Giannoulias who entered the United States at Miami, Florida, on or about the 13th day of April 1950 is subject to deportation under the following provisions of the laws of the United States to wit:

> The Act of May 14, 1937, in that, at the time of entry, she was not entitled to admission on the preference-quota visa which she presented upon arrival for the reason that such visa was obtained through fraud, in that she contracted a marriage to procure entry to the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United

States and by his direction, do hereby command you to take into custody and deport the said alien pursuant to law, at the expenses of the Appropriation, "Salaries and Expenses Immigration and Naturalization Service, 1954," including the expenses of an attendant if necessary.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 31st day of July, 1953.

/s/ H. R. LANDON,
District Director [20]

U. S. Department of Justice, Board of Immigration Appeals

DECISION

File: A-7451818—Los Angeles July 9, 1953

In re: Basiliki Andre Giannoulias or Yiannoulias or Basiliki Fitsos in Deportation Proceedings.

In Behalf of Respondent: Robert S. Butts, Esq., 6331 Hollywood Blvd., Hollywood 28, California, and Robert T. Reynolds, Esq., 1000 National Press Building, Washington, D. C. (Heard September 18, 1952.)

Charges: Warrant: Act of 1937—Visa obtained by fraud—failure to fulfill marital agreement.

Lodged: None.

Application: Termination of proceedings or voluntary departure.

Detention Status: Released under bond.

This case is before us on appeal from a decision

of the Acting Assistant Commissioner dated May 23, 1952, directing that the respondent be deported.

The respondent is a 41-year-old female, native and citizen of Greece, whose only entry into the United States occurred on April 13, 1950, at which time she was admitted for permanent residence upon presentation of a nonquota immigration visa issued under Section 4(a) of the Immigration Act of 1924. In 1949, as a result of discussions between the respondent's brother and two other persons, George and John Fitsos, the latter proceeded to Nassau, Bahamas and married the respondent there on March 27, 1950. John Fitsos testified (Ex. 11, p. 4) that the respondent's brother sent him a total of $500 and he used this and $700 of his own funds for the expense of bringing the respondent to the United States. The respondent and John Fitsos have not, at any time, had sexual intercourse with each other. John Fitsos regarded the civil ceremony at Nassau as a valid marriage but, at the request of the respondent, it was agreed that consummation of the marriage would be deferred pending a religious ceremony to be performed at Los Angeles, California. However, a religious ceremony was never performed.

John Fitsos filed a suit for annulment of the marriage in California on May 18, 1950 and this suit was dismissed without prejudice at his request on September 14, 1950 (Ex. 8). The respondent filed a suit for divorce from Fitsos on September 8, 1950 in the State of Nevada and she was granted a divorce the same day.

There is no substantial controversy regarding the facts set forth above. Counsel argued that the question involved was whether the parties had agreed that, in addition to the civil ceremony, there was to be a church marriage in Los Angeles, and he contends that John Fitsos, from the first, had no intention of proceeding with a religious ceremony. The testimony of John Fitsos is to the contrary (Ex. 13, p. 9), and since both Fitsos and the repondent state that it had been decided that a religious ceremony would be performed at Los Angeles, this matter is not one concerning which there is any dispute. The principal conflict in testimony is that the respondent states that John Fitsos subsequently refused to proceed with a religious ceremony as had been planned, whereas Fitsos asserts that he was willing but that the respondent would not agree to the religious ceremony unless he gave her a $5,000 checking account in her name, an automobile and a 5-family apartment house (Ex. 11, pp. 4 and 5).

We have carefully considered the testimony of the respondent, her brother and the witnesses produced by the Government. We note that the respondent's testimony (pp. 30 and 31), to the effect that about 1949 she was informed that her turn under the quota would soon be reached, is contradicted by Exhibit 14 which contains information from the American Embassy at Athens, Greece, that in that office alone there were 6,482 applicants ahead of her. We also think it is obvious that the respondent had been informed that an annulment

that it was because of that factor that she instituted a divorce proceeding in another jurisdiction after the annulment proceeding had been commenced in California by Fitsos. The respondent's denial that this was her motive (p. 34) impresses us unfavorably. From our review of the respondent's testimony, we find it to be unconvincing, particularly with reference to her assertion that she was willing to proceed with the religious ceremony and with respect to her denial that she made any pecuniary or property demands upon John Fitsos.

Fitsos testified that he considered the civil ceremony at Nassau as constituting a valid marriage and that he was willing to consummate the marriage at that time. He spent approximately $700 of his own [22] funds in connection with the respondent's entry into the United States. Although he had lived in Washington, D. C. for many years, he proceeded to Los Angeles, California a few days after his wife, and he testified that the sole purpose of his trip to that city was in order that they might be married in a Greek church (Ex. 13, p. 10). After careful consideration of the record, we find that Fitsos went to Los Angeles for the purpose of being married to the respondent in a religious ceremony; that he remained willing to proceed with such ceremony until the respondent made certain financial demands upon him; and that the attempt by the respondent to impose these conditions amounted to a refusal on her part to fulfill her marital obligations and to proceed with the religious marriage ceremony. We conclude that the respondent married

John Fitsos solely for the purpose of securing admission to the United States; that after her entry, she failed or refused to fulfill her promises for such marital agreement; and that she, therefore, obtained her immigration visa fraudulently. Accordingly, the respondent is deportable under the Act of May 14, 1937.

The record indicates that the respondent desires the discretionary relief of voluntary departure if found to be subject to deportation (p. 70). The Hearing Officer and the Acting Assistant Commissioner concluded that discretionary relief was not warranted and we concur in that conclusion. Under present regulations, we would not have jurisdiction to grant voluntary departure since the respondent has only resided in the United States since April 13, 1950. In view of the foregoing, we will dismiss the appeal.

Order: It is ordered that the appeal be and the same is hereby dismissed.

/s/ THOS. S. FINUCANE,
Chairman [23]

[Endorsed]: Filed October 16, 1953.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR WRIT OF HABEAS CORPUS

Your petitioner, Basiliki Andre Giannoulias, respectfully represents to the Court as follows:

I.

That your petitioner is imprisoned, detained, confined and restrained of her liberty by Herman R. Landon, District Director, Immigration and Naturalization Service, Department of Justice, Los Angeles District, in violation of the laws of the United States and the Constitution thereof, and that such imprisonment, detention, confinement and restraint is illegal and unlawful.

II.

That the facts showing the illegality and unlawfulness of petitioner's imprisonment, detention, confinement and restraint are as follows, to wit: [189]

1. That petitioner is an alien, a native and citizen of Greece, 41 years of age, a resident of the City of Los Angeles, State of California who was lawfully admitted into the United States for permanent residence at Miami, Florida, on April 13, 1950.

2. That the imprisonment, detention, confinement and restraint of your petitioner is claimed by the aforesaid Herman R. Landon to be based upon an order of deportation issued by the Assistant Com-

missioner, Immigration and Naturalization Service, Washington, D. C., under date of May 23, 1952, the appeal from such order of deportation having been dismissed by the Board of Immigration Appeals in Washington, D. C., on July 9, 1953.

3. That the said order of deportation directs that petitioner be deported from the United States on the charge that she is in this country in violation of the Act of May 14, 1937, in that at the time of her entry at Miami, Florida, on April 13, 1950, she was not entitled to admission upon the basis of the visa she presented for the reason that such visa was procured by fraud, in that she contracted a marriage to procure entry into the United States as an immigrant and failed or refused, after entry, to fulfill the promise for such marital agreement.

4. That the order of deportation was issued and made after hearings before officers of the Immigration and Naturalization Service in Los Angeles, California, on January 4, 1951, February 8, 1951 and April 16, 1952.

5. That the charge upon which the order of deportation is based is not true, and there is no reliable, probative and substantial evidence in the record of the deportation proceedings establishing that the petitioner failed or refused to fulfill any promises made by her for [190] a marital agreement to procure her entry into the United States as an immigrant; that she specifically denies that she entered into the marriage at Nassau, The Bahamas, on April 27, 1950, with any reservations or intention of not assuming the marital duties and

obligations; that she was ready, willing and able to undertake a religious ceremony in the Greek Orthodox Church in Los Angeles, California, but her husband, John Peter Fitsos, failed and refused to proceed with such ceremony; that she denies specifically that she suggested or sought to impose any conditions upon her husband, John Peter Fitsos, precedent to undertaking a religious ceremony in the Greek Orthodox Church in Los Angeles; that her statements are corroborated by her brother, Theodore A. Giannos, and all of such testimony is contained in the file of the Immigration and Naturalization Service now before this Court as Exhibit "A" of the Return to Order to Show Cause.

6. That the order of the Assistant Commissioner, directing the deportation of petitioner, is not within the scope of his legal authority, in that the statutory language of Title 8, U.S.C. Sec. 213a., specifically the second paragraph thereof under which petitioner has been ordered deported, is limited to male immigrants only; moreover, petitioner did not fail or refuse to fulfill any promises made by her for the marital agreement as required by the statute, nor was such marital agreement made solely and fraudulently to procure entry as an immigrant; accordingly, she is not within the classes contemplated by the statute and the Immigration and Naturalization Service has exceeded its authority and is acting arbitrarily and capriciously in ordering her deportation.

7. That the hearing accorded the petitioner by the [191] Immigration and Naturalization Service

is unfair in that the hearing officer received in evidence as Exhibit 14, over objection of counsel, certain communications of the Department of State purporting to show that petitioner had knowledge of her status under the quota, without giving petitioner an opportunity to inspect or examine the files of the Department of State with respect to other communications which might have a bearing upon the issue of such knowledge.

8. That the hearing officer of the Immigration and Naturalization Service and the Assistant Commissioner acted unfairly and outside the scope of their authority by failing and neglecting to give full faith and credit, in making their determinations, to the fact that the Eighth Judicial Court of the State of Nevada, in and for the County of Clark, at the time of rendering a final judgment of divorce on September 8, 1950 in favor of the plaintiff in the case of Basilika A. Fitsos vs. John Petros Fitsos, found, as a prerequisite to granting the divorce, that a valid subsisting marriage existed between the parties.

III.

That no other application for writ of habeas corpus has been made by or on behalf of petitioner, and she has exhausted her administrative remedies and has no other means of determining the illegality of her detention other than by habeas corpus proceedings.

IV.

That Herman R. Landon, District Director, Immigration and Naturalization Service, Los Angeles

District, threatens and intends to deport your petitioner from the United States and will do so unless restrained by this Court.

Wherefore, your petitioner prays that a writ of habeas corpus issue and that Herman R. Landon as District Director of the [192] Immigration and Naturalization Service, Los Angeles District, be required to produce the body of your petitioner before this Court so that the matter may be heard and determined as the Court shall deem just; further, that pending the hearing on the said writ of habeas corpus or upon an order to show cause why said writ should not issue, that your petitioner be released from imprisonment and confinement upon giving a suitable bond for her appearance in an amount to be fixed by order of this Court.

/s/ BASILIKI ANDRE GIANNOULIA

Dated: October 22, 1953.

/s/ FREDERICK C. DOCKWEILER,
/s/ MARSHALL E. KIDDER,
Attorneys for Petitioner [193]

Affidavit of Service by Mail attached. [200]

[Endorsed]: Filed October 23, 1953.

[Title of District Court and Cause.]

STIPULATION RENDERING UNNECESSARY THE FILING OF A FURTHER RETURN TO THE AMENDED PETITION FOR HABEAS CORPUS

Whereas, the above named respondent has heretofore filed his Return to Order to Show Cause Why Writ of Habeas Corpus Should Not Issue in the above entitled case, and

Whereas, since the filing of said Return, the petitioner has filed an Amended Petition for Writ of Habeas Corpus,

It Is Hereby Stipulated by and between the above named parties, through their respective counsel, that the Return filed by the respondent to the original Petition for Writ of Habeas Corpus shall be deemed the Return to the Amended Petition for Writ of Habeas Corpus.

It Is Further Stipulated that new matters, if any, raised by the Amended Petition for Writ of Habeas Corpus not specifically denied in the Return heretofore filed, shall be deemed denied as though an Amended Return had been made thereto and filed herein.

Dated: November 16, 1953. [202]

FREDERICK C. DOCKWEILER,
MARSHALL E. KIDDER,
/s/ By MARSHALL E. KIDDER,
Attorneys for Petitioner

LAUGHLIN E. WATERS,
United States Attorney
/s/ ROBERT K. GREAN,
Assistant U. S. Attorney
Attorneys for Respondent

Approved 11/16/53.

/s/ PEIRSON M. HALL,
Judge [203]

[Endorsed]: Filed November 16, 1953.

[Title of District Court and Cause.]

STIPULATION RE TRAVERSE TO RETURN TO WRIT OF HABEAS CORPUS

The parties hereto, through their respective counsel, hereby stipulate that petitioner's pleading heretofore filed on Oct. 23, 1953 and entitled "First Amended Complaint for Writ of Habeas Corpus," be regarded as and deemed to be a traverse to respondent's "Return to Order to Show Cause Why Writ of Habeas Corpus Should Not Issue".

Dated: November 9, 1953.

LAUGHLIN E. WATERS,
United States Attorney
/s/ By ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Respondent

FREDERICK C. DOCKWEILER,
MARSHALL E. KIDDER,
/s/ By MARSHALL E. KIDDER,
Attorneys for Petitioner

Approved and accepted: 11/24/53.

/s/ PEIRSON M. HALL,
United States District Judge [204]

[Endorsed]: Filed November 25, 1953.

[Title of District Court and Cause.]

MEMORANDUM FOR ORDER

The petitioner, a citizen of Greece, entered the United States from that country by way of Miami, Florida, on April 13, 1950, after contracting a marriage with an American citizen, John Petros Fitsos, at Nassau, Bahama Island, on the 27th of March, 1950. She was ordered deported under the terms and provisions of the second paragraph of Section 213(a), Title 8, United States Code, which reads as follows: "When it appears that the immigrant fails or refuses to fulfill his promises for a marital agreement made to procure his entry as an immigrant, he then becomes immediately subject to deportation". (The 1952 Immigration and Naturalization Act made some changes hereafter noted in re-enacting the above section as subdivision (2) of subdivision (c) of Section 1251 of Title 8, United States Code.)

The matter is before the court on a petition for a writ of habeas corpus alleging several errors of law, and that there was no substantial evidence to support the conclusion of the Immigration Department upon which the order of deportation was based.

The first error of law is alleged to be that the statute is unconstitutional as being ambiguous and uncertain. I find nothing in the terms of the statute or upon its face which suggests that degree of ambiguity or uncertainty required to hold an act of Congress unconstitutional.

It is next contended that the use of the word "his" in the Statute precludes the application of the statute to the petitioning female. In this connection, petitioner quotes from the legislative history of the statute and calls attention to the fact that in re-enacting it in 1952 as Section 1251, Title 8 U. S. Code, both the masculine and feminine gender were used in the statute in the following language: "(c) An alien shall be deported * * * if * * * (2) it appears to the satisfaction of the Attorney General that he or she has failed and refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant". It is argued that Congress, by using the above language in the re-enactment of the statute in 1952 clearly indicated that the intent of Congress under the previous statute, was to make the previous statute applicable only to males. There are two difficulties with this contention: first, the question involved concerns the intent of Congress in 1937 in

the enactment of the applicable statute, (viz.: the second paragraph of Section 213(a) of Title 8 U. S. Code), and not the intention of Congress in 1952 on its re-enactment. The Act of 1937 is to be interpreted according to the provisions of Title 1, United States Code, § 1, which states, inter alia, "Words importing the masculine gender may be applied to females". It is, therefore, clear to me that the use of the masculine gender in the Act of 1937 [8 U. S. Code § 213(a)] was intended to include an immigrant female as well as an immigrant male.

From the record presented with the return of the Director it appears that the husband, John Petros Fitsos, filed a complaint for annulment of the marriage in the Superior Court of the State of [206] California, in and for the County of Los Angeles on May 18, 1950, but that said action was dismissed, after an answer containing general denials was filed by the petitioner herein. Subsequent to the filing of the above mentioned action, the petitioner filed a complaint for divorce in Nevada, alleging cruelty upon which a decree of divorce was granted on September 8, 1950 by the Nevada Courts. In view of the settled law in California, (Petry vs. Petry, 47 C.A. 2d 594), that a final decree of divorce conclusively determines as between the parties that they were legally married, it occurred to me that a question might be present in the instant proceedings as to the effect of the Nevada divorce under the full faith and credit clause of the Constitution, i.e., whether or not the Nevada decree of divorce established the validity of the Nassau

marriage so as to preclude any findings in the immigration proceedings concerning the validity of that marriage, or any fraud by either party in connection with its contraction. In response to the court's request, counsel filed full and helpful briefs on the subject. But upon examination of them, and the authorities cited, and a re-examination of the statute, I am satisfied there is nothing to the point. One may be subject to deportation under the above-quoted provision of the statute [formerly 8 U.S.C. § 213(a)] regardless of the validity or invalidity of a "marital agreement", i.e.: marriage. If the immigrant "fails or refuses to fulfill his promises" made in connection with it, then the immigrant is subject to deportation. From the plain reading of the section it is the failure and refusal to keep the promise for a marital agreement, not the agreement itself or any virtue or fault of the marital agreement itself, which the act condemns.

An additional error of law was assigned by the petitioner in claiming that the hearings were unfair in permitting the introduction into evidence of what is described as Exhibit 14, which were certain communications of the Department of State dealing with the quota status of petitioner. It is claimed that it rendered the whole proceedings unfair because it did not give the petitioner an opportunity [207] to examine or inspect the files of the State Department with respect to other communications which might have a bearing upon the issue of the knowledge of the petitioner that she was far down on the quota list. I can see no ground for sustaining

and containing the transcript of the administrative hearings of the petitioner and the exhibits introduced therein, and the Court having heretofore on April 12, 1954 filed its Memorandum for Order in the above entitled case, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law: [209]

Findings of Fact

I.

That on or about July 31, 1953, by authority of the Attorney General, a Warrant of Deportation directing the deportation of the petitioner, Basiliki Andre Giannoulias, an alien, was issued.

II.

That the issuance of said Warrant of Deportation was based upon deportation proceedings in which hearings were held on January 4 and February 8, 1951 and April 16, 1952.

III.

That the Warrant of Deportation issued July 31, 1953, by authority of the Attorney General, recites that the alien petitioner last entered the United States at Miami, Florida, on or about the 13th day of April, 1950, and directs that the said alien be deported under the Act of May 14, 1937 (8 U.S.C.A. 213a), in that, at the time of entry, she was not entitled to admission on the preference-quota visa which she presented upon arrival for the reason that such visa was obtained through fraud, in that

she contracted a marriage to procure entry into the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement.

IV.

That May 23, 1952, the Assistant Commissioner of the Immigration and Naturalization Service affirmed the Findings of the Hearing Officer and ordered the alien deported. That petitioner appealed to the Board of Immigration Appeals from the decision of the Assistant Commissioner of Immigration and Naturalization affirming the Findings of the Hearing Officer, and on July 9, 1953, the Board of Immigration Appeals dismissed petitioner's appeal, all of which exhausted the administrative remedies of the petitioner.

V.

That the Immigration and Naturalization Service that conducted said hearings had jurisdiction to act. [210]

VI.

That the petitioner had notice of the hearings, was represented by counsel, and had opportunity to show that she did not come within the classification of aliens whose deportation Congress has directed.

VII.

That there were no procedural irregularities in said hearings which deprived the petitioner of basic and fundamental procedural safeguards.

VIII.

That said administrative hearings were fair.

IX.

That there was reasonable, substantial and probative evidence to support the Warrant of Deportation.

Conclusions of Law

I.

That the petitioner is deportable under the Act of May 14, 1937 (8 U.S.C.A. 213a) in that petitioner, after administrative hearings, has been found not to have been entitled to admission on the preference-quota visa which she presented upon arrival for the reason that such visa was obtained through fraud in that she contracted a marriage to procure entry into the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement.

II.

That the Immigration and Naturalization Service that conducted the hearings had jurisdiction to act, that the hearings were fair, that none of the constitutional rights of the petitioner were abridged or violated, and that there is reasonable, substantial and probative evidence to support the Order of Deportation.

III.

That the terms of the statute under which petitioner has been found deportable and ordered de-

ported are constitutional on their face and as applied to the petitioner. [211]

IV.

That the detention of the petitioner by the respondent, H. R. Landon, District Director of Immigration and Naturalization Service for purposes of deportation is lawful and proper.

V.

That the Petition for Writ of Habeas Corpus should be denied, the Order to Show Cause issued herein on October 12, 1953 should be discharged, and the prayer for relief contained in petitioner's Amended Petition for Writ of Habeas Corpus should be denied, and the petitioner should be remanded to the custody of the respondent for deportation according to law.

Dated: This 11th day of April, 1954.

/s/ PEIRSON M. HALL,
Judge, United States District Court

Approved as to form pursuant to Local Rule 7(a):

FREDERICK C. DOCKWEILER,
MARSHALL E. KIDDER,
Attorneys for Petitioner. [212]

Acknowledgment of Service attached. [213]

[Endorsed]: Filed June 14, 1954.

In the United States District Court, Southern District of California, Central Division

No. 15927-PH

BASILIKI ANDRE GIANNOULIAS,
Petitioner,

vs.

HERMAN R. LANDON, as District Director, Immigration and Naturalization Service, Los Angeles District, Respondent.

JUDGMENT

The above entitled matter came on regularly for hearing on an Order to Show Cause why a Writ of Habeas Corpus should not issue on October 26, 1953 and November 16, 1953 in the above entitled Court before the Honorable Peirson M. Hall, Judge Presiding, the petitioner being present in Court, and being represented by her attorneys, Frederick C. Dockweiler and Marshall E. Kidder, and the respondent being represented by his attorneys, Laughlin E. Waters, United States Attorney, and Robert K. Grean, Assistant United States Attorney, by Robert K. Grean, and the Court having heard oral argument of counsel, and having considered counsels' Memoranda of Points and Authorities, and the Court having examined and considered the complete administrative record of the Immigration and Naturalization Service pertaining to the petitioner and containing the transcript of the administrative hearings of the petitioner and

the exhibits introduced therein, and the Court having heretofore on April 12, 1954, filed its Memorandum for Order in the above entitled case, and being fully advised in the premises, and the Court having heretofore made and filed its Findings of Fact and Conclusions of [215] Law, and having ordered that a Judgment be entered in accordance therewith,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the Petition of Basiliki Andre Giannoulias for a Writ of Habeas Corpus be and the same is hereby denied.

2. That the Order to Show Cause heretofore issued in the above entitled case on the 12th day of October, 1953, be and the same is hereby discharged.

3. It Is Further Ordered that the bond of said petitioner posted with this Court in the sum of $1,000, releasing the petitioner pending hearing of the Order to Show Cause be exonerated and that the petitioner be remanded to the custody of the respondent, H. R. Landon, District Director of Immigration and Naturalization Service, for deportation forthwith.

4. It Is Further Ordered that the respondent have his costs.

Dated: This 11th day of April, 1954.

/s/ PEIRSON M. HALL,
Judge, United States District Court

Approved as to form pursuant to Local Rule 7(a):

FREDERICK C. DOCKWEILER,
MARSHALL E. KIDDER,
Attorneys for Petitioner. [216]

Acknowledgment of Service attached. [217]

[Endorsed]: Judgment Docketed and Filed June 14, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Basiliki Andre Giannoulias, Petitioner herein, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in the above entitled action against petitioner and in favor of respondent, which said judgment was entered in this action on June 14, 1954.

FREDERICK C. DOCKWEILER,
MARSHALL E. KIDDER,
/s/ By MARSHALL E. KIDDER,
Attorneys for Petitioner [218]

Acknowledgment of Service attached. [219]

[Endorsed]: Filed June 14, 1954.

[Title of District Court and Cause.]

ORDER STAYING EXECUTION OF JUDGMENT

Good cause appearing therefor, and upon motion of the petitioner made in open court on June 14, 1954, she being represented by her attorneys, Frederick C. Dockweiler and Marshall E. Kidder, by Marshall E. Kidder, and the respondent being represented by his attorneys, Laughlin E. Waters, United States Attorney, and Robert K. Grean, Assistant United States Attorney, by Robert K. Grean, and it appearing that the petitioner has filed this day a notice of appeal to the Circuit Court of Appeals for the Ninth Circuit, it is hereby ordered that the execution of judgment heretofore entered in this case on June 14, 1954 be stayed for a period of thirty days, unless sooner ordered by the Court, to permit the petitioner opportunity to perfect the record on appeal and to make appropriate representations to the said Circuit Court relative to [220] admission to bail pending adjudication of her appeal.

It is further ordered that if the petitioner fails to file, within the aforesaid thirty-day period, an appropriate motion requesting enlargement upon bail pending disposition of her appeal, that she be remanded forthwith to the custody of the respondent.

Done in open court this 28th day of June, 1954.

/s/ PEIRSON M. HALL,
United States District Judge

Approved as to Form June 21, 1954:

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney [221]

[Endorsed]: Filed June 28, 1954.

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It Is Hereby Stipulated by and between counsel for the respective parties hereto:

That the portions of the record and proceedings in the above entitled matter to be included in the record on appeal shall consist of the following:

1. Complaint for writ of habeas corpus.
2. Order to Show Cause.
3. Return to Order to Show Cause why writ of habeas corpus should not issue.
4. First Amended Complaint for Writ of Habeas Corpus.
5. Memorandum for Order. [222]
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Notice of Appeal.
9. This Stipulation re Record on Appeal.

10. Order Staying Execution of Judgment.
Dated: July 1, 1954.

MARSHALL E. KIDDER,
FREDERICK C. DOCKWEILER,
/s/ By MARSHALL E. KIDDER,
Attorneys for Petitioner

LAUGHLIN E. WATERS,
United States Attorney
ROBERT K. GREAN,
Assistant U. S. Attorney
/s/ By ROBERT K. GREAN,
Attorneys for Respondent [223]

[Endorsed]: Filed July 25, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 223, inclusive, contain the original Complaint and First Amended Complaint for Writ of Habeas Corpus; Order to Show Cause Why Writ of Habeas Corpus Should Not Issue; Return to Order to Show Cause Why Writ of Habeas Corpus Should Not Issue; Stipulation re Return to Amended Petition for Writ of Habeas Corpus; Stipulation re Traverse to Return to Writ of Habeas Corpus; Memorandum for Order; Findings of Fact and Conclusions of Law; Final Judg-

ment; Notice of Appeal; Order Staying Execution of Judgment; and Stipulation re Record on Appeal which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 6th day of July, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk
/s/ By THEODORE HOCKE,
Chief Deputy

[Endorsed]: No. 14418. United States Court of Appeals for the Ninth Circuit. Basiliki Andre Giannoulias, Appellant, vs. Herman R. Landon, as District Director, Immigration and Naturalization Service, Los Angeles District, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 7, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14418

BASILIKI ANDRE GIANNOULIAS,
Appellant,

vs.

HERMAN R. LANDON, as District Director, Immigration and Naturalization Service, Los Angeles District, Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT RELIES

Basiliki Andre Giannoulias, as appellant herein, presents herewith the following statement of points upon which she intends to rely on appeal.

The District Court erred in finding as a fact that:

1. The administrative hearings of the Immigration and Naturalization Service were fair.

2. There is reasonable, substantial and probative evidence to support the warrant of deportation.

The District Court erred in concluding as a matter of law that:

1. The appellant is deportable under the Act of May 14, 1937 (8 U.S.C.A. 213a), as a person found not to have been entitled to admission on the preferance-quota visa which she presented upon arrival for the reason that such visa was obtained through fraud in that she contracted a marriage to procure

entry into the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement.

2. The hearings conducted by the Immigration and Naturalization Service were fair, that none of the constitutional rights of the appellant were abridged or violated, and that there is reasonable, substantial and probative evidence to support the order of deportation.

3. The terms of the statute under which appellant has been found deportable and ordered deported are constitutional on their face and as applied to the appellant.

4. The appellee is entitled to judgment and costs.

Dated: August 20, 1954.

MARSHALL E. KIDDER,
FREDERICK C. DOCKWEILER,

By /s/ MARSHALL E. KIDDER,
Attorneys for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 23, 1954.

PAUL P. O'BRIEN,
Clerk.

No. 14418

United States Court of Appeals

for the Ninth Circuit

BASILIKI ANDRE GIANNOULIAS,

Appellant,

vs.

HERMAN R. LANDON, as District Director, Immigration and Naturalization Service, Los Angeles District,

Appellee.

Transcript of Record

In Two Volumes

Volume II

(Pages 47 to 291)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-28-55

No. 14418

United States Court of Appeals

for the Ninth Circuit

BASILIKI ANDRE GIANNOULIAS,

Appellant,

vs.

HERMAN R. LANDON, as District Director, Immigration and Naturalization Service, Los Angeles District,

Appellee.

Transcript of Record

In Two Volumes

Volume II

(Pages 47 to 291)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-28-55

United States of America
Department of Justice
Immigration and Naturalization Service

October 16, 1953.

CERTIFICATION

By Virtue Of the authority vested in me by Title 8, Code of Federal Regulations, Section 2.1, a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and Nationality Act,

I Hereby Certify that the annexed documents are originals, or copies thereof, from the records of the said Immigration and Naturalization Service, Department of Justice, relating to Basiliki Andre Giannoulias, File No. A7 451 818, of which the Attorney General is the legal custodian by virtue of Section 103 of the Immigration and Nationality Act.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

[Seal] /s/ H. R. LANDON,
District Director, Immigration and Naturalization Service. [19*]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

United States of America
Department of Justice
Los Angeles, Calif.

WARRANT—DEPORTATION OF ALIEN

No. A7 451 818.

To: District Enforcement Officer, Los Angeles, California.

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized immigrant inspector, and upon the basis thereof, an order has been duly made that the alien Basiliki Andre Giannoulias, who entered the United States at Miami, Florida, on or about the 13th day of April, 1950, is subject to deportation under the following provisions of the laws of the United States to wit:

> The Act of May 14, 1937, in that, at the time of entry, she was not entitled to admission on the preference—quota visa, which she presented upon arrival for the reason that such visa was obtained through fraud, in that she contracted a marriage to procure entry to the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States

and by his direction, do hereby command you to take into custody and deport the said alien pursuant to law.

Appropriation, "Salaries and Expenses Immigration and Naturalization Service, 1954," including the expenses of an attendent if necessary.

For so doing this shall be your sufficient warrant. Witness my hand and seal this 31st day of July, 1953.

/s/ H. R. LANDON,
District Director. [20]

U. S. Department of Justice
Board of Immigration Appeals

July 9, 1953.

DECISION

File: A-7451818—Los Angeles.

In re: Basiliki Andre Giannoulias or Yiannoulias or Basiliki Fitsos, in Deportation Proceedings.

In Behalf of Respondent:

Robert S. Butts, Esquire, 6331 Hollywood Blvd., Hollywood 28, California; and

Robert T. Reynolds, Esquire, 1000 National Press Building, Washington, D. C.

(Heard September 18, 1952.)

Charges:

Warrant: Act of 1937 — Visa obtained by fraud—failure to fulfill marital agreement.

Lodged: None.

Application: Termination of proceedings or voluntary departure.

Detention Status: Released under bond.

This case is before us on appeal from a decision of the Acting Assistant Commissioner dated May 23, 1952, directing that the respondent be deported.

The respondent is a 41-year-old female, native and citizen of Greece, whose only entry into the United States occurred on April 13, 1950, at which time she was admitted for permanent residence upon presentation of a nonquota immigration visa, issued under Section 4(a) of the Immigration Act of 1924. In 1949, as a result of discussions between the respondent's brother and two other persons, George and John Fitsos, the latter proceeded to Nassau, Bahamas, and married the respondent there on March 27, 1950. John Fitsos testified (Ex. 11, p. 4) that the respondent's brother sent him a total of $500 and he used this and $700 of his own funds for the expense of bringing the respondent to the United States. The respondent and John Fitsos have not, at any time, had sexual intercourse with each other. John Fitsos regarded the civil [21] ceremony at Nassau as a valid mariage but, at the request of the respondent, it was agreed that consummation of the

marriage would be deferred pending a religious ceremony to be performed at Los Angeles, California. However, a religious ceremony was never performed.

John Fitsos filed a suit for annulment of the marriage in California, on May 18, 1950, and this suit was dismissed without prejudice at his request on September 14, 1950, (Ex. 8). The respondent filed a suit for divorce from Fitsos on September 8, 1950, in the State of Nevada, and she was granted a divorce the same day.

There is no substantial controversy regarding the facts set forth above. Counsel argued that the question involved was whether the parties had agreed that, in addition to the civil ceremony, there was to be a church marriage in Los Angeles, and he contends that John Fitsos, from the first, had no intention of proceeding with a religious ceremony. The testimony of John Fitsos is to the contrary (Ex. 13, p. 9), and since both Fitsos and the respondent state that it had been decided that a religious ceremony would be performed at Los Angeles, this matter is not one concerning which there is any dispute. The principal conflict in testimony is that the respondent states that John Fitsos subsequently refused to proceed with a religious ceremony as had been planned, whereas Fitsos asserts that he was willing, but that the respondent would not agree to the religious ceremony unless he gave her a $5,000 checking account in her name, an automobile and a 5-family apartment house (Ex. 11, pp. 4 & 5).

We have carefully considered the testimony of the respondent, her brother and the witnesses produced by the Government. We note that the respondent's testimony (pp. 30 & 31), to the effect that about 1949 she was informed that her turn under the quota would soon be reached, is contradicted by Exhibit 14, which contains information from the American Embassy at Athens, Greece, that in that office alone there were 6,482 applicants ahead of her. We also think it is obvious that the respondent had been informed that an annulment of the marriage might lead to her deportation and that it was because of that factor that she instituted a divorce proceeding in another jurisdiction after the annulment proceeding had been commenced in California, by Fitsos. The respondent's denial that this was her motive (p. 34) impresses us unfavorably. From our review of the respondent's testimony, we find it to be unconvincing, particularly with reference to her assertion that she was willing to proceed with the religious ceremony and with respect to her denial that she made any pecuniary or property demands upon John Fitsos.

Fitsos testified that he considered the civil ceremony at Nassau, as constituting a valid marriage and that he was willing to consummate the marriage at that time. He spent approximately $700 of his own [22] funds in connection with the respondent's entry into the United States. Although he had lived in Washington. D. C., for many years, he proceeded

to Los Angeles, California, a few days after his wife and he testified that the sole purpose of his trip to that city was in order that they might be married in a Greek church (Ex. 13, p. 10). After careful consideration of the record, we find that Fitsos went to Los Angeles for the purpose of being married to the respondent in a religious ceremony; that he remained willing to proceed with such ceremony until the respondent made certain financial demands upon him; and that the attempt by the respondent to impose these conditions amounted to a refusal on her part to fulfill her marital obligations and to proceed with the religious marriage ceremony. We conclude that the respondent married John Fitsos solely for the purpose of securing admission to the United States; that after her entry, she failed or refused to fulfill her promises for such marital agreement; and that she, therefore, obtained her immigration visa fraudulently. Accordingly, the respondent is deportable under the Act of May 14, 1937.

The record indicates that the respondent desires the discretionary relief of voluntary departure if found to be subject to deportation (p. 70). The Hearing Officer and the Acting Assistant Commissioner concluded that discretionary relief was not warranted and we concur in that conclusion. Under present regulations, we would not have jurisdiction to grant voluntary departure since the respondent has only resided in the United States since April 13, 1950. In view of the foregoing, we will dismiss the appeal.

Order: It is ordered that the appeal be and the same is hereby dismissed.

/s/ THOS. G. FINUCANE,
Chairman. [23]

Before the Board of Immigration Appeals

Oral argument: September 18, 1952.

In re: Basiliki Andre Giannoulias.

File: 7451818.

Board: Messrs. Finucane and Charles and Miss Wilson.

Heard: Robert T. Reynolds, Attorney, 1000 National Press Building, Washington, D. C.

Request: Voluntary departure.

Attorney: This is the case of a Greek woman who entered the United States as the wife of an American citizen and has been charged with having procured a visa by fraud. Counsel respectfully contends that the evidence and testimony of this record do not at all establish the existence of any fraud or any intent to defraud the Immigration officials or to circumvent the immigration laws.

This seems to be the evidence of an internal family squabble which concerned the family of John Fitsos, the husband of this alien, and her own family, including herself and her brother and her sister-in-

law. The alien is a member of the Greek Orthodox Church. Her American citizen husband was also a member of that church. It is well known to the Board that it is the custom of these people to be married in their church, often after or independently of a civil ceremony. Reflecting the fact that this is a custom and that the husband, John Fitsos, abided by this custom, it will be noted from the testimony that John Fitsos, who lodges the complaint against the alien, has married again, a Greek girl, and this time has had the marriage in the Greek church.

This was a marriage which was arranged by relatives; in other words, the alien's brother showed the prospective husband's brother a picture of his sister in Greece and gave some general description of her habits, character, et cetera; and then in New York showed the picture to the prospective husband. At one time during the testimony it will be discovered that the husband, John Fitsos, later felt himself to have been duped when he saw the original of the picture, claiming that it had been taken some ten years earlier; and I really feel that that and one other fact which was brought out in our examination of the husband here in Washington are the reasons that this matter was brought up at all.

John Fitsos was a single Greek man of some fifty some years, of some property, and he desired to take himself a wife, a person pretty much of his own background and customs and beliefs; and when the brother showed him this picture, he was quite well

taken with her [24] and entered into correspondence with the girl, as a result of which it was finally agreed that they would be married—in the Bahamas, I believe, Nassau—and there the testimony seems to differ. Fitsos insisted that it was a marriage, so far as he was concerned, and that he had no particular desire or intent to marry her later, and didn't care whether he married her later or not—and in fact did not—it will be noted that the same Fitsos, when he married the second time, which was immediately after this—as immediately as possible after this matter was ended by divorce—did marry in the Greek church.

The alien has insisted that it was agreed at all times that they would be married in Los Angeles, where her brother and John Fitsos' brother resided, and that when he brought her to the United States, she went immediately to Los Angeles and he went up to New York to see his sister, who was married to still a third person of Greek ancestry. This is a very interesting thing; because he went to New York to see his sister and brother-in-law, as the latter—a Mr. Smyrnis—was leaving for Greece and there were some business affairs to be settled before Smyrnis left from Greece. Smyrnis went to Greece, and went to a small city, the name of which I have forgotten, and whether or not he made this arrangement we could not bring out in talking with Mr. Fitsos, but it's quite coincidental that when Fitsos went to Greece, he went to the very city to which his brother-in-law, Smyrnis, had gone, and there married a girl whom he had not known before, and

in a city he had never visited before but I had no power to force Fitsos to admit that this arrangement had been made during the time of his marriage to this alien; but the possibility and the coincidence exists.

Fitsos says that after he came to Los Angeles, his wife refused to see him and wouldn't go through with the Greek Church ceremony unless he provided her with a large amount of goods. She on her part says it isn't so, that he never made any effort to arrange for a Greek marriage, and he himself at one time admitted that he never even went to see a Greek priest there in Los Angeles; that he never provided her any home to live in in the United States, not even a hotel room; and I think she said he never gave her as much as $2.

I fail to see how the testimony of Fitsos is entitled to any greater weight than the testimony of his wife. Yet the decision of the examining officer seems to be rested solely on that and finds the testimony of the wife to be prejudicial, I believe, in one place.

Chairman: The marriage, of course, was not consummated.

Attorney: The marriage was never consummated; that's entirely correct. But it was terminated by a divorce. An annulment proceeding was begun——

Miss Wilson: Who instituted that, she or he? [25]

Attorney: He instituted an annulment proceeding, and she began a divorce proceeding. He dropped his annulment proceeding.

Chairman: This charge is predicated on the

usual language in the statute that the visa was procured through fraud in that the alien failed or refused after entry to fulfill her promises for such marital agreement.

Attorney: Well, I don't think that she did, and it's our contention that she did not.

Chairman: She did fail to proceed with a normal marital relationship; that's clear. Then the issue is, was it because of her wilfulness or was it because of the attitude her husband took? That's what it comes down to, isn't it?

Attorney: Well, I believe it comes down to a question whether they agreed that there should be a church ceremony following the civil ceremony. I know it is customary with the Greek people to do that. And she stood at all times ready to go forward with that, and he refused to. That's her position. His position is that she demanded a large, something akin to a dowry, I suppose, which is sort of a reverse matter, before she would marry him in the Greek church. He is unable to state that he ever even approached a priest to arrange a marriage, or that he ever offered her a place to live.

Chairman: I assume that would be more or less useless if she wouldn't marry him without a large sum of money.

Attorney: If that was true.

Chairman: It really comes down to whether you are going to believe his story or her story.

Attorney: That's correct.

There were no further questions.

Form G-28
(Rev. 4-26-46)

U. S. Department of Justice
Board of Immigration Appeals and
Immigration and Naturalization Service

Date: Sept. 18, 1952.

In re: Baskiliki Andre Ginnoulias.

File Number: 7451818.

I hereby enter my appearance as attorney for (or representative of): ....., or as asasociated with ....., the attorney of record, and my appearance is at his request.

(Check appropriate item, if applicable):

(X) 1. I have been admitted to practice before the Board of Immigration Appeals and the Immigration and Naturalization Service:

(X) Attorney.

* * *

/s/ ROBERT T. REYNOLDS,
Attorney. [27]

7 451 818

August 14, 1952.

Robert S. Butts, Esquire,
6331 Hollywood Boulevard,
Hollywood 28, California.

re: Butts:

Baskiliki Andre Giannoulias

Thursday, September 18, 1952.

Atty. Robert Reynolds. [28]

Date: June 9, 1952.
(Show date of mailing)

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS, DEPARTMENT OF JUSTICE, WASHINGTON 25, D. C.

In Re: Basiliki Andre Giannoulias.
File No: A-7451818.

I desire to appeal from the order of the Commissioner of Immigration and Naturalization, notice of which I received on June 4, 1952.

I do desire oral argument before the Board of Immigration Appeals in Washington, D. C.

/s/ ROBERT S. BUTTS,
(Signature of Respondent or Representative.)
6331 Hollywood Blvd.,
Hollywood 28, Calif.

Note 1. Under regulations, oral argument before the Board of Immigration Appeals on an original appeal from an order of the Commissioner is a matter of right, and, on motions for reconsideration, it is within the discretion of Board of Immigration Appeals to grant oral argument (Title 8, Code of Federal Regulations, Sections 90.3, 90.4, 90.5, 90.11). Please indicate if oral argument is desired.

Note 2. If the appellant is in detention or has been denied admission to the United States at the Canadian or Mexican border, he will not be released from detention nor permitted to enter the country to present oral argument to the Board. In such cases, if representation is desired, the appellant should arrange for someone to present his case to the Board of Immigration Appeals. Unless arrangement is made at the time the appeal is taken, where representation is desired, the Board of Immigration Appeals will not calendar the case for argument.

ADJ-19-Field.
(2-1-49)

Atty. Butts,
Thursday, Sept. 18.

[Stamped]: File requested June 11, 1952.
Received June 11, 1952, Board of Immigration Appeals. [29]

Law Offices
Peter F. Snyder
Robert T. Reynolds
1000 National Press Building
Washington 4, D. C.

June 11, 1952.

Hon. Thos. G. Finucane, Chairman,
Board of Immigration Appeals,
Apex Building,
Washington 25, D. C.

In re: A-7451818, Giannoulias, Basiliki A.

Dear Mr. Chairman:

Reference is made to the Central Office decision in the subject proceeding dated May 23, 1952, upon which appeal has been taken by Robert S. Butts, Esq., Los Angeles, California, attorney for alien.

It is respectfully requested that our interest in the subject proceeding in association with Attorney Robert S. Butts, be noted to the record, and that notice of docketing the matter for oral argument before the Board of Immigration Appeals be sent us also.

Your courtesy is appreciated.

Respectfully yours,

/s/ ROBERT T. REYNOLDS.

RTR:t

Copy to—
Robert S. Butts, Esq.,
6331 Hollywood Boulevard,
Hollywood 28, California.

[Stamped]: Received June 12, 1952, Board of Immigration Appeals. [30]

Form 16-271
(Rev. 8-7-51)

United States Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

File No: A7 451 818 BP-H.

Date: June 12, 1952.

To: Commissioner, Washington, D.C.

From: District Director, Los Angeles, California.

Subject: Your file No. A7 451 818 WU Basiliki Andre Giannoulias or Yiannoulias or Basiliki Fitsos, Notice of Appeal to the Board of Immigration Appeals.

There is transmitted herewith, pursuant to 8 CFR 90.9(b), Notice of Appeal to the Board of Immigration Appeals in the above-entitled case.

The Notice of Appeal was filed within the time prescribed by regulation.

Attachment:

Received by Dept. of Justice, June 16, 1952.

Received by Warrant Unit June 18, 1952. [31]

ADJ-304
(4-28-52)

United States Department of Justice
Immigration and Naturalization Service

Appeal—15.

File: A-7451818—Los Angeles (A-7451818).

In re: Basiliki Andre Giannoulias or Yiannoulias or Basiliki Fitsos.

May 23, 1952.

In Deportation Proceedings:

In Behalf of Respondent: Robert S. Butts, Esquire, 6331 Hollywood Boulevard, Hollywood 28, California.

Charges.

Warrant: Act of 1937—Visa obtained by fraud—failure to fulfill marital agreement.

Lodged: None.

Application: Voluntary departure.

Detention Status: Released under bond.

Discussion: Upon consideration of the entire record, including the exceptions taken, the findings relating to deportability made by the officer conducting the hearing are hereby adopted.

The facts and circumstances in this case do not warrant the exercise of any discretionary relief.

Order: It is ordered that the alien be deported from the United States, pursuant to law, on the charge stated in the warrant of arrest.

/s/ ELEANOR ENRIGHT,
Acting Assistant Commissioner
Adjudications Division.

RAV/fd

[Stamped]: Assistant Commissioner Enforcement Division, May 23, 1952. Signed and Forwarded. [33]

U. S. Department of Justice
Immigration and Naturalization Service

File: A7 451 818.

In re: Basiliki Andre Giannoulias or Yiannoulias, also known as Basiliki Fitsos.

EXCEPTIONS OF RESPONDENT TO HEARING OFFICER'S DECISION

Discussion: The Hearing Officer has drawn inferences from the testimony most favorable to the Department's position and has elected to accept as

truthful the testimony of John Fitsos. An examination of the entire record conclusively establishes that the inferences drawn by the Hearing Officer are unwarranted by the evidence and further that the evidence given by John Fitsos is so inherently improbable as to tax the credulity. There is no question from the evidence that respondent and John Fitsos intended to contract a valid marriage and that they did so. The sole purpose of the marriage was to enter into the marital relationship and except for the unwarranted inferences of the Hearing Officer there is no evidence to the contrary. Respondent affirmatively testified that she desired and requested that the marriage be completed and consummated. It may reasonably be inferred from all of the circumstances that Fitsos' bride-to-be did not meet with his standards of beauty, but since he was in Nassau for the purpose of concluding the marriage he had no choice but to submit. He knew that he would have adequate opportunity to "stall off" the proposed Orthodox ceremony and that is precisely the scheme which he followed. There is no creditable evidence whatever in the record to support any conclusion other than the fact that respondent entered into the marriage in good faith, had every intention of being the wife of John Fitsos, but was deluded and defrauded by him. The good faith of the respondent throughout the entire matter is adequately supported by her testimony and by the testimony of her brother and to the contrary the bad faith of Fitsos is evidenced throughout the

record. Certainly if the respondent had been so bent upon entering the United States under fraudulent circumstances as is urged by the Hearing Officer, she would not have hesitated to have lived at least a little while with Fitsos after the marriage. If the respondent is so devious and villainous as is implied in the opinion she would not have hesitated to carry her deception a little further. The whole basis of the Hearing Officer's decision is suspicion and not evidence and even the suspicion is [34] ill-founded.

Clearly the deportation proceedings should be dismissed and there would, therefore, be no reason for the granting of discretionary relief although we are unable to determine the basis upon which the Hearing Officer decides that the case does not warrant the granting of such relief.

Findings of Fact

Respondent excepts to proposed Finding of Fact No. (3) and in lieu thereof proposes the following Finding of Fact:

> That the respondent contracted a marriage with a citizen of the United States in good faith and with the full intention of fulfilling her marital vows and was at all times ready, willing and able to fulfill her promises for such marital agreement.

Conclusion of Law

Respondent excepts to the proposed Conclusion of Law of the Hearing Officer and urges the adoption in lieu thereof of the following:

> That respondent is not subject to deportation upon any ground. That at the time of respondent's entry into the United States she was entitled to admission on the non-quota visa which she presented upon arrival. That such visa was not obtained through fraud. That the marriage between respondent and her American citizen husband was valid and not contracted for the purpose of securing an illegal entry into the United States.

Order

Respondent excepts to the proposed order and urges the adoption in lieu thereof the following:

That these proceedings be dismissed.

Respectfully submitted,

/s/ ROBERT S. BUTTS,
Attorney for Respondent.

May 12, 1952. [35]

16-404
5-21-51

United States Department of Justice
Immigration and Naturalization Service
458 South Spring Street
Los Angeles 13, California

Date: May 7, 1952.

File No. A7 451 818 HS

Registered Mail

Return Receipt Requested

Mr. Robert S. Butts,
Attorney at Law.
6331 Hollywood Blvd.,
Hollywood 28, Calif.

Dear Sir:

Reference is made to the hearing on April 16, 1952, in the deportation proceedings against Basiliki Andre Giannoulias.

Transmitted herewith is a copy of the Hearing Officer's Decision in the case, furnished in accordance with 8 CFR 151.5(b).

For consideration by the Commissioner of this Service in the case, you may submit to this office exceptions to the decision and supporting reasons for such exceptions, or you may waive this action. Your exceptions, with supporting reasons, if this action is taken, should be submitted to this office in duplicate on or before the expiration of five business

days from receipt of this letter. Upon receipt here, your communication, with the record of hearing and the Hearing Officer's Decision, will be forwarded to the Commissioner at Washington for decision in this case.

You will be informed in due course of the decision. Please notify this office promptly of any change of address.

Yours very truly,

H. R. LANDON,
District Director.

Encl. [36]

U. S. Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

May 7, 1952.

File: A7 451 818.

In Re: Basiliki Andre Giannoulias or Yiannoulias, also known as Basiliki Fitsos.

In Deportation Proceedings.

On Behalf of Respondent: Robert S. Butts, Attorney at Law, 6331 Hollywood Blvd., Hollywood 28, California.

Charges:

Warrant: Act of 1937—Visa obtained through fraud, in that she contracted a marriage to pro-

cure entry to the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement.

Lodged: None.

Application: Voluntary Departure.

Detention Status: Released under $1,000 bond.

Discussion: This record relates to a 39-year-old divorced female, a native and citizen of Greece, who entered the United States at Miami, Florida, on April 13, 1950, as a non-quota immigrant. The entry has been verified. She has stated that this was her only entry into this country.

According to the record she met and married one John Fitsos through arangements made by her brother, Ted Geiannos, and one George Fitsos, the brother of the groom. The marriage took place in Nassau, Bahamas Islands, March 27, 1950. Subsequent to this marriage the respondent obtained the non-quota immigration visa which she presented at time of entry into this country.

It has been established for the record that the respondent filed a visa application with the American Embassy at Athens, Greece, in 1937, and again reapplied on September 10, 1947, at which time her name was reregistered as number 6483 on the non-preference waiting list. It is evident that even in 1950 respondent was a long way down on the waiting list. [37]

According to both the statements of the respondent and her husband John Fitsos, he was desirous

of consummating the marriage before arriving in the United States but bowed to the respondent's wishes that they not assume the man and wife relationship until after they were married in the Greek Orthodox Church in Los Angeles. John Fitsos has testified that even so he considered himself married and free to enter into the marital relationship. Upon arriving in the United States the respondent proceeded to the home of her brother in Los Angeles, California, while the groom went to Malone, New York, to take care of some business. He proceeded to Los Angeles some 10 days later and contacted the respondent and her brother. Both the respondent and the witnesses generally agree as to the facts up to this point, but they disagree as to the events thereafter.

The groom, John Fitsos, has testified that after arriving in Los Angeles the respondent refused to marry him by church ceremony or be his wife until he showed that he was in possession of certain monies, properties and established in business. His testimony as to these financial demands is corroborated by the testimony of his brother, George Fitsos. The respondent, on the other hand, has testified that upon arrival in Los Angeles John Fitsos was cool, indifferent and reluctant to enter into the agreements previously made. Her testimony is corroborated by that of her brother, Ted Geiannos, who acted as a go-between. John Fitsos has testified that he came to Los Angeles to keep his part of the agreement and it has not been shown that he came to Los Angeles for any other purpose. According

to the testimony of John Fitsos he entered into the marriage in good faith and it has not been shown that he had anything to gain other than a wife. On the other hand, the respondent had all to gain and nothing to lose. According to the record an immigration visa was not readily obtainable except as the wife of a United States citizen.

The respondent's testimony and that of her brother to the effect that she was willing to go through with the agreement is self-serving and unreliable. It must, therefore, be held that the respondent is subject to deportation as provided in the second paragraph to Section 3 of the Act approved May 14, 1937. This view of the facts is supported by the broad construction given to that paragraph in the opinion of the Solicitor of Labor, 55804/996 (May 22, 1940), wherein, after a discussion of the legislative history of the provision, it is stated:

"It is believed, therefore, that the following construction of the second paragraph of Section 3 is reasonably warranted: 'When the marriage of a citizen to an alien results in the alien spouse being admitted to the United States under a non-quota or preference quota status, the alien's failure to continue to maintain and keep the marital status intact for some reason that is traceable back to the inception of the marriage and establishes the marriage to have been fraudulent from its very beginning, the alien spouse may be made the subject of deportation proceedings, provided, of course, that the purpose for which the fraud was perpetrated was solely to

fraudulently expedite the admission to the United States.' "

(In the Matter of L.T.H., A6 714 677, 11/13/47, Int. Dec. 123.) [38]

The respondent divorced John Fitsos at Las Vegas, Nevada, on September 15, 1950. The respondent has accomplished a long-standing desire in gaining admission to the United States, but for the marriage ceremony which took place in the Bahamas on March 27, 1950, she would still be waiting the issuance of a non-preference quota visa. As a matter of fact, there has been no marriage and the respondent, if expelled from the United States, will have lost nothing that was not gained as a result of the marriage ceremony with John Fitsos on March 27, 1950. As a matter of administrative discretion the facts and circumstances in this case do not warrant the granting of discretionary relief.

Respondent has stated that in the event of deportation she desires to be deported to Greece.

Findings of Fact

Based upon all the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of Greece;

(2) That the respondent last entered the United States at Miami, Florida, on April 13, 1950, as a non-quota immigrant under the provisions of Section 4(a) of the Immigration Act of 1924;

(3) That the respondent contracted a marriage to procure entry to the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement.

Conclusion of Law

Based upon the foregoing findings of fact, it is concluded:

(1) That under Section 3 of the Act approved May 14, 1937, and Section 14 of the Immigration Act of 1924, the respondent is subject to deportation on the ground that at the time of entry, she was not entitled to admission on the non-quota visa which she presented upon arrival for the reason that such visa was obtained through fraud, in that she contracted a marriage to procure entry to the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement. [39]

Order

It is ordered that the respondent be deported from the United States pursuant to law on the following charge:

The Act of May 14, 1937, in that, at the time of entry, she was not entitled to admission on the non-quota visa which she presented upon arrival for the reason that such visa was obtained through fraud, in that she contracted a marriage to procure entry to the United States

as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement.

/s/ ALFRED E. EDGAR, JR.,
Hearing Officer.

Los Angeles, California, May 7, 1952. [40]

U. S. Department of Justice
Immigration and Naturalization Service
Los Angeles, California
Alien File No. A7 451 818

DEPORTATION PROCEEDINGS

Place of Hearing: Los Angeles, California.
Date of Hearing: January 4, 1951.

Persons Present:

Hearing Officer: Alfred E. Edgar, Jr.
Examining Officer: Richard L. Lay.
Greek Interpreter: Mr. John Christopoulos, 836 South Harper, Los Angeles 5, Calif.
Respondent's Counsel: Robert S. Butts, Atty. at Law, 6331 Hollywood Blvd., Hollywood 28, Calif.
Respondent: Basiliki Andre Giannoulias.

In the Case of:

BASILIKI ANDRE GIANNOULIAS or YIANNOULIAS.

Hearing Conducted in the Greek Language and Recorded by Dictaphone.

Hearing Officer to Interpreter:

Q. Will you please stand and be sworn? Do you solemnly swear that you will correctly translate to the best of your ability all the questions and answers and material in this proceeding from English to Greek and from Greek to English, so help you God? A. I do.

To Respondent (Through Interpreter, throughout the proceedings):

Q. What is your name?

A. My name is Basiliki Andre Giannoulias.

Q. I now show you a warrant of arrest issued for Basiliki Andre Giannoulias, which was served upon her at Los Angeles, California, November 27, 1950, and ask you if you are the person upon whom this warrant was served? A. Yes, it is.

Q. Are you being represented by Mr. Robert Butts, who is present? A. Yes.

Q. (To Counsel): Is counsel ready to proceed with the hearing at this time?

A. No, counsel is not ready to proceed with the hearing at this time. I called Mr. Scallorn last night, in the late afternoon, and informed him of my circumstances and was informed by him that I should present the same circumstances to the Examining Officer and the Hearing Officer at [41] this time. Mr. Giannoulias, the brother of the subject, the immigrant named in this matter, consulted me for the first time at about 3:00 o'clock yesterday after

noon, showing me the notice which he had received of this hearing, or which had been addressed to the immigrant concerning this hearing, and the envelope in which the notice was enclosed was post marked December 28, 1950, at 7:30 p.m. Mr. Giannoulias stated that he did not actually receive the notice until he returned to his home day before yesterday, and first consulted with me yesterday afternoon; the first opportunity I had to talk to my client was this morning at 8:00 o'clock. I am informed by Mr. Giannoulias that he has previously written to Greece to obtain some correspondence which would be material to the defense of the defendant.

I have not had an opportunity to confer sufficiently or to assemble documents to properly defend the immigrant. In addition to that I previously had notice by subpoena to take a deposition in an action pending in the Superior Court, which deposition is scheduled to be taken at 10:00 a.m. this morning in the office of Mr. Smith, an attorney in the Rowan Building, and I must be present at the taking of that deposition at that time pursuant to the subpoena served. I will be perfectly content to have the matter continued over as short a time as even this afternoon, for the purpose of proceeding to a certain extent and then asking only for a further continuance to produce additional evidence on behalf of the immigrant.

Q. (Hearing Officer to Examining Officer): Do you have anything to say to that, Mr. Lay?

A. The Service has two witnesses that have, under considerable difficulty, appeared here for the

hearing this morning, and I would like to, under some procedure, secure their testimony at this time before any continuance of this hearing might be granted.

By Counsel: Couldn't we do that, Mr. Lay, as far as you are concerned, on any stipulation that you might desire to have from me relative to taking the testimony of those witnesses out of order? I don't know the proposed nature of their testimony, but if we could take them before taking her testimony, and then if we could get out, say, even by 10:15 so that I could be at the Rowan Building by 10:30, then we could continue the balance of it until such time as would be convenient to you.

Q. (Hearing Officer to Examining Officer): Well, Mr. Lay, do you think you could dispose of your two witnesses in half an hour?

A. I believe so. I am willing to take them out of order at this time if it is agreeable to all parties concerned. [42]

By Counsel: I would just like to impose that if things hadn't descended upon me without any opportunity to make other arrangements, I wouldn't do that.

Q. (Hearing Officer to Respondent): I have here this warrant of arrest which charges that you entered the United States at Miami, Florida, on April 13, 1950, and are subject to deportation from the United States for the reason that at the time of entry you were not entitled to admission to the United States on the preference quota visa which you presented, for the reason that such visa was

obtained through fraud, in that you contracted a marriage to procure entry into the United States as an immigrant and failed or refused, after entry, to fulfill the marital agreement. Do you understand this charge against you? A. Yes, I do.

Q. Will you please stand and raise your right hand and be sworn? Do you solemnly swear that all the statements you are about to make in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God? A. Yes.

Q. A copy of the letter addressed to you, dated December 28, 1950, is entered of record in this hearing and marked Exhibit 1.

A copy of the warrant of arrest which has been served upon you is entered of record in the hearing and marked Exhibit No. 2. Do you understand?

A. Yes, I do.

By Hearing Officer: You may proceed, Mr. Lay.

Q. (Examining Officer to Hearing Officer): Is it the arrangement of the proceedings here that the Government witnesses will be called at this time, or the evidence concerning them presented even though it may be out of order?

A. Yes, I believe that's the understanding.

Q. (Hearing Officer to Counsel): Is that agreeable, Mr. Butts? A. It is perfectly agreeable.

Examining Officer: Inasmuch as it is the desire of counsel for the respondent to expedite the proceedings this morning, I would like at this time to present for the inspection of counsel and respondent the original typewritten record of a sworn statement of one George P. Fitsos, who is identified [43]

in the statement as a brother of the ex-husband of the respondent here, and ask them to examine this statement, which I desire to introduce into the record of this proceeding as the testimony of the witness, who is available for cross-examination on the part of the counsel if he so desires.

Q. (By Counsel to Examining Officer): There are numerous objections which I desire to interpose to the various questions and to the answers in addition to motion to strike certain of the answers upon certain legal grounds, and I think it will probably be necessary to proceed as to each question and make a separate objection, because the objections to certain questions are different than they are to others, and the grounds for motion to strike as to certain answers are different than they are as to others.

What is your pleasure as to the procedure, Mr. Lay—for me to simply refer to the question by number and state my objection or my motion? I can number the questions as I go along and thus identify——

A. I would rather the Hearing Officer would decide what procedure he desires to be followed in order to make the record as clear as possible.

Q. (Hearing Officer to Examining Officer): Do I understand, Mr. Lay, that you are offering the statements of George P. Fitsos in evidence?

A. I stated to the counsel it is my intention to offer them, and to clarify the record. I at this time do offer the statements of George Fitsos, taken on

November 2, 1950, and November 7, 1950, for introduction into the record of this proceeding.

By Hearing Officer: Counsel may state his objections by reference to question number and the page number.

Q. (By Counsel to Hearing Officer): The respondent objects to the introduction of the two statements last referred to by the Examining Officer and for specific grounds of objections and with reference to question and answer by number, may I insert in ink in the border the number of the questions as I go along, Mr. Hearing Officer?

A. Yes, that will be satisfactory.

By Counsel: Objection is made to Question No. 12 appearing on Page 2 upon the ground that the question itself calls for hearsay. Motion is made to strike the answer upon the ground that the answer is hearsay and contains conclusions of the [44] witness.

By Hearing Officer to Counsel: Your objection is overruled, counsel, on that point.

Q. (Counsel to Hearing Officer): Is there a ruling on the motion to strike?

A. Motion denied.

By Counsel: Respondent next objects to Question No. 14 on Page 2 upon the ground that the question calls for hearsay, and move to strike the answer upon the ground that the answer consists of hearsay statements and conclusions of the witness.

By Hearing Officer: Your objection to that question is sustained, counsel, and your motion to strike it will be granted.

By Counsel: Respondent next objects to Question No. 15 on Page 2 upon the ground that the question calls for a conclusion of the witness and I move to strike the answer upon the ground that the answer is a conclusion of the witness and is based upon hearsay.

By Hearing Officer: Your objection to that question is also sustained and your motion granted, counsel.

By Counsel: Respondent's next objections to Question No. 16 on Page 3 upon the ground that the question calls for the conclusion of the witness, and move to strike the answer, upon the ground that the answer consists of a conclusion of the witness and is based upon hearsay.

By Hearing Officer: Your objection to that question is also sustained, and the motion granted.

By Counsel: The respondent moves to strike the answer to Question No. 18 upon the ground that there is no proper foundation to indicate personal knowledge of the events related by the witness and that the answer constitutes facts based upon hearsay.

By Hearing Officer: Your motion is granted, counsel. [45]

By Counsel: Respondent next moves—I will withdraw that—just a moment, please.

Respondent next moves to strike the answer to Question No. 20 upon the ground that there is no proper foundation shown of witness' knowledge of the matters therein related and that the matters therein stated are based upon hearsay.

By Hearing Officer: We'll deny that motion, counsel.

By Counsel: Respondent next moves to strike the answer to Question No. 22 upon the ground there is no foundation to show the personal knowledge of the witness as to the facts stated, and further upon the ground that the answer contains a conclusion, the conclusion of the witness.

By Hearing Officer: Motion is granted.

By Counsel: Respondent objects to the Question No. 29 on the ground that the question calls for hearsay, and moves to strike the answer upon the ground that the answer is based upon hearsay.

By Hearing Officer: The objection sustained and the motion granted.

By Counsel: Respondent next objects to Question No. 30 upon the ground that the question calls for the conclusion of the witness, and moves to strike the answer upon the ground that the answer consists of conclusions of the witness.

By Hearing Officer: The objection is sustained and the motion granted.

By Examining Officer: Exception.

By Counsel: Respondent objects to the Question No. 32 insofar as the question relates to her brother, Ted, and moves to strike the answer upon the ground that the answer consists of hearsay, there being no proper foundation to show that the facts therein stated were stated by the respondent, and it is indicated that those facts were stated by the witness' brother.

By Hearing Officer: The objection is sustained and the motion granted.

By Examining Officer: Exception to the ruling.

By Counsel: Respondent moves to strike the answer to Question No. 33 upon the ground that the answer is not responsive, and upon the further ground that it shows upon its face to be hearsay.

By Hearing Officer: Objection sustained and the motion is granted. [46]

By Counsel: Respondent objects to Question No. 34 as to form upon the ground that it calls for a conclusion of the witness. Respondent moves to strike the answer to Question No. 34 on the ground that it is hearsay, and contains conclusions of the witness.

By Hearing Officer: The objection sustained and the motion granted.

By Counsel: Respondent objects to Question No. 37 upon the ground that the question calls for a conclusion of the witness and moves to strike the answer on the ground that the answer is a conclusion of the witness.

By Hearing Officer: Objection sustained and the motion granted.

By Counsel: May we continue with the same sequence of numbering as to the second group of the statement so that the second will begin with Question No. 42?

By Hearing Officer: For the purpose of the record, the first question in the statement taken November 7, 1950, will be considered No. 42. Proceed, counsel.

By Counsel: Respondent moves to strike the portion of the answer to Question 53, beginning at the last line on Page 2 with the words "but before," continuing on Page 3 to the end of Question No. 53 on the ground that the answer is hearsay.

By Hearing Officer: Motion is granted, counsel.

By Counsel: Respondent objects to Question No. 54 upon the ground it calls for a conclusion of the witness and moves to strike the answer upon the ground that it is a conclusion of the witness.

By Hearing Officer: Objection sustained and motion granted.

By Counsel: Respondent moves to strike the answer to Question No. 56 upon the ground that it consists of hearsay.

By Hearing Officer: Objection is overruled, counsel, and motion denied.

By Counsel: That completes the questions in those two statements.

By Hearing Officer to Respondent: Now, with the exception of the questions and answers to which the objections have been sustained and the motions granted, the statement of [47] George P. Fitsos made at Los Angeles, California, November 2, 1950, will be received in evidence and marked Exhibit No. 3.

The statement made by the same person at Los Angeles on November 7, 1950, will be made Exhibit No. 4.

To Examining Officer: You may proceed, Mr. Lay.

By Counsel: May I interject, your Honor.

By Hearing Officer: Yes.

By Counsel: Do I understand, Mr. Lay, that Mr. Fitsos will now be produced for cross-examination?

By Examining Officer: If that is the desire of counsel.

By Counsel: I would like to ask him only very briefly.

By Hearing Officer: Very well. The witness is called.

GEORGE P. FITSOS

called as witness.

Hearing Officer to Witness:

Q. Will you please raise your right hand and be sworn? Do you solemnly swear that all the statements you are about to make in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God? A. Yes.

Q. Will you please state your full name and residence address, please?

A. George Fitsos, 5554 Carpenter Street, North Hollywood.

Q. (To Examining Officer): Mr. Lay, do you have any further questions by way of direct examination? A. No.

To Counsel: Your witness, counsel.

Q. (Counsel to Witness George Fitsos): Mr. Fitsos, are you a member of the Greek Orthodox Church? A. I am.

(Testimony of George P. Fitsos)

Q. And do you follow the religion of the Greek Orthodox Church? A. I do. [48]

Q. Do you know what the custom is with respect to members of the Greek Orthodox Church with regard to having a religious ceremony according to the Greek Orthodox rites before consummating a marriage by living together as husband and wife?

A. I don't exactly, no.

Q. Don't you know that it is a fact that persons who follow the Greek Orthodox religion as a universal custom do not live together as man and wife until they have consummated a marriage under the rites of the Greek Orthodox Church?

A. No, I don't.

Q. Did you ever hear Miss Gianopoulos state to your brother that she insisted upon their having a marriage ceremony according to the rites of the Greek Orthodox Church? A. If I hear who?

Q. Basilica Gianopoulos?

A. No, I don't know, I don't.

Q. Do you mean you don't know who I refer to?

A. No. I know who you refer to, no.

Q. Then is your answer that you don't remember whether she made that statement, or what is your answer?

A. What statement—will you repeat it?

Q. Did you ever hear Miss Gianopoulos state in the presence of your brother that she insisted that they participate in a ceremony under the rites of the Greek Orthodox Church? A. No.

Q. Did you ever hear your brother offer to en-

(Testimony of George P. Fitsos)

gage in a marital ceremony with Miss Gianopoulos under the rites of the Greek Orthodox Church?

A. It was understood to come here and get married under the Orthodox Church. He asked them—he asked her to marry him under the Church in Nassau, and she did not agree. She didn't want to get married down there in the Greek Orthodox Church.

Q. Your brother told you that when they left Nassau, Bahamas Islands, that it was the plan of Miss Gianopoulos and himself to have a marriage ceremony in Los Angeles—— A. Yes.

Q. In the Greek Orthodox Church?

A. Yes.

By Counsel: I have nothing further. [49]

Q. (Hearing Officer to Examining Officer): Any further questions, Mr. Lay?

Q. (Examining Officer to Witness): Did you ever hear your brother state whether or not he was willing to go ahead with the wedding ceremony in the Greek Orthodox Church here in Los Angeles?

A. (By Counsel): To which we will object upon the ground of form of question and that it lacks foundation to show the presence of the respondent and therefore calls for hearsay.

By Hearing Officer: The objection is overruled.

Q. (To Witness): Will you answer the question, please?

A. The question was, if I heard my brother——

Q. (Examining Officer to Witness): Did you

(Testimony of George P. Fitsos)

ever hear your brother state whether or not he was willing to go ahead with the marriage ceremony——

A. Certainly he was. She come here for that purpose.

Q. The question was, did you hear your brother state his willingness? A. Yes.

By Counsel: We will move to strike the answer on the same ground of the objection to the question.

By Hearing Officer: The motion is denied.

By Examining Officer: I have no further questions of the witness.

By Counsel: I have nothing further.

By Hearing Officer: Witness is excused.

(Witness is called.)

Q. (To Witness): Will you raise your right hand and be sworn. Do you solemnly swear that all the statements you are about to make in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do. [50]

Q. Will you please state your full name and residence address, please?

A. Mrs. Lula May Fitsos, 5554 Carpenter, North Hollywood.

To Examining Officer: Proceed, Mr. Lay.

LULA FITSOS

Examining Officer to Witness:

Q. Of what country are you a citizen, Mrs. Fitsos? A. United States.

Q. How did you acquire that citizenship?

A. I was born here.

Q. Are you married or single?

A. Married.

Q. And what is the name of your husband?

A. George P. Fitsos.

Q. Are you acquainted with the respondent in these proceedings, Miss Basiliki Andre Giannoulias, who is seated on your left? A. Yes.

Q. Is she related to you in any manner?

A. Well, she married my brother-in-law, but she is divorced now.

Q. When did you first meet the respondent?

A. Oh, it was in April, sometime in April.

Q. Of what year? A. Last year.

Q. April, 1949? A. No, '50.

Q. 1950? A. Yes, that's right.

Q. Where did you first meet the respondent?

A. Well, her brother brought her to my home.

Q. Is that the home you are now residing in?

A. Mm-hmm.

Q. When did you first meet the brother-in-law of whom you speak, who you stated married the respondent?

A. Oh, I have known him—he was at my house in '26.

Q. 1926? A. Mm-hmm. [51]

(Testimony of Lula Fitsos)

Q. Where does that brother-in-law reside at the present time?

A. We heard from him a few days ago, and he was in Washington, D. C.

Q. Did you have any continuous contact with your brother-in-law prior to the time that you state he brought the respondent to your home?

A. Well, my brother-in-law didn't bring her. Her brother brought her.

Q. Oh, her brother brought her to your home?

A. Yes.

Q. Was your brother-in-law whom you identified as the ex-husband of the respondent at your home at that time? A. No, he wasn't.

Q. He was not at your home?

A. No. The first time they came he was not.

Q. For what purpose did the respondent and her brother come to your home?

A. Came to see us. She had just gotten here from the old country.

Q. That was immediately subsequent to her arrival in the United States, you mean?

A. I think so. I am not sure.

Q. And where was your brother-in-law at that time, if you know?

A. He was in New York.

Q. Had your brother-in-law mentioned the respondent to you in any respect or identified her to you in any way?

A. Well, I hadn't heard anything from him. He

(Testimony of Lula Fitsos)

wrote to my husband and they was married in Nassau.

Q. At the time the respondent came to your home in April, 1950, she was identifled to you as the wife of your brother-in-law, is that correct?

A. Yes, that's right.

Q. Did your brother-in-law later meet the respondent at your home?

A. Yes, April the 30th was the first time. April the 30th, 1950.

Q. How long was that after the first occasion that the respondent came to your home?

A. Oh, I think it was about two weeks, as well as I remember.

Q. At the time of the second occasion of the respondent's visit to your home when your brother-in-law was there did you hear any marriage plans discussed? A. The second time? [52]

Q. Yes.

A. Well, they talked in Greek, and I don't understand Greek, and don't speak it.

Q. During that visit then you did not know what they talked about—— A. No, I did not.

Q. In any manner? A. No, I do not.

Q. Did the respondent subsequently visit in your home?

A. Well, they only was there three times, and that was three Sundays, straight in a row.

Q. During any of those three visits did you hear marriage plans of your brother-in-law or the respondent discussed?

(Testimony of Lula Fitsos)

A. No, because they always talked in Greek.

Q. Did your brother-in-law reside or live at your home during that three week's period?

A. Yes, he did.

Q. Did he at any time tell you in English any plans that he had for a marriage ceremony with the respondent? A. Yes, he told me——

By Counsel: Now just a moment. The answer is Yes.

By Witness Lula Fitsos: Yes.

Q. (Examining Officer to Witness Lula Fitsos): And did he state that it was his intention to marry the respondent?

A. (By Counsel): To which we will object upon the ground that it is leading and suggestive and further upon the ground that it calls for hearsay and there has been no foundation shown of the presence of the respondent.

By Hearing Officer: The objection is sustained.

Q. (Examining Officer to Witness Lula Fitsos): During any of the—strike that—did your brother-in-law visit in your home prior to the time that he met the respondent there, which you stated was her second visit to your home?

A. Not for about 16 years. I hadn't seen him in about 16 years. [53]

Q. Was he in your home when the respondent came there the second time? A. Yes, he was.

Q. How long had he been there?

A. He had been there just a couple of days.

(Testimony of Lula Fitsos)

Q. You have stated that on the occasion of the first visit he was in New York—is that correct?

A. Mm-hmm.

Q. When he came to your home did he state for that purpose he had come here to visit you?

A. (By Counsel): To which we will object on the ground that it calls for hearsay, there being no foundation shown of the presence of the respondent.

By Hearing Officer: Objection is overruled.

To Witness: Will you answer the question, please?

By Witness: Yes, he came here to get his wife, he said.

Q. (Examining Officer to Witness): And by his wife did you identify that person as the respondent here? A. Yes, yes.

Q. And how long did he stay at your home?

A. He was there 'til the last Thursday in June.

Q. Approximately one month or——

A. No, it was a little over two months.

Q. A little over two months?

A. Mm-hmm.

Q. Did he reside continuously in your home during that period of time?

A. Yes. He went to San Francisco, I think, one time, and was gone a couple of days.

Q. Did the respondent reside at your home at any time during that period of time? A. No.

Q. When your brother left your home, to where did he go, if your know?

A. To Washington, D. C. [54]

(Testimony of Lula Fitsos)

Q. Did the respondent in this proceeding here accompany him at that time, if you know?

A. No, she didn't.

Q. (Counsel to Examining Officer): Mr. Lay, I may have misunderstood, but I think you asked her in that last question if her "brother" went to Washington, D. C., and I am sure you were referring to her brother-in-law—I may be mistaken, but that's the way I heard it.

A. Thank you. I meant the brother-in-law, if I did state the "brother."

Q. (Examining Officer to Witness): And you understood the question as meaning your brother-in-law? A. Yes, that's right.

Q. On any occasion on which you have met the respondent—you stated that she was in your home on three occasions—did you at any time hear her make any conditions as to—that must be fulfilled prior to the completion of the marital agreement with your brother-in-law?

A. No, I didn't understand, because they was talking in Greek.

Q. And you—was the conversation that took place in your home in Greek interpreted to you by anybody at any time?

A. Yes. Now John told me——

By Counsel: Now just a moment. The answer to the question is Yes. We will object to any further answer without further questions.

Q. (Examining Officer to Witness): Did you on the occasion of any of the visits of the respondent

(Testimony of Lula Fitsos)

to your home have any arguments or trouble with her?

A. Well, I didn't have any trouble with her, but there was three of them, Ted, her brother, and his wife, and her, and they was arguing so for three Sundays straight the last Sunday that they was there I ordered them out.

Q. By "them" who do you mean?

A. Ted Giannos, her brother, and his wife, and her.

Q. By "her" you mean the respondent?

A. Yes.

Q. You mean on the occasion of the last visit that you have mentioned you ordered the three of them to leave your home?

A. Yes, they was making such a racket in there and I wasn't going to have it in my home. [55]

Q. Did you inquire of any of the participants as to what the argument was about?

A. No, I didn't.

Q. Did any of the participants in the argument state to you what the argument was about?

A. Yes, her sister-in-law.

Q. The sister-in-law of the respondent?

A. Yes.

Q. And what is her name?

A. Ida Giannas.

Q. That is spelled G-i-a-n-n-a-s? A. Yes.

Q. And did this Ida Giannas tell you what the argument was about?

A. It was the next day.

(Testimony of Lula Fitsos)

Q. In what manner did you——

A. She called me on the phone to apologize for the way they acted.

Q. And did she make an apology to you for her actions in your home? A. Yes.

Q. And did she at that time state to you what the argument was about that caused the disturbance?

A. Yes.

Q. Will you state what Ida Giannas told you was the cause of the argument?

A. She said that——

By Counsel: Just a moment—to which we will object upon the ground that it calls for hearsay, and foundation shown that the respondent was not present at the phone conversation between this witness and the informant.

By Hearing Officer: The objection is overruled. We will admit the testimony.

Q. (To Witness): Will you state now what the conversation was about?

A. Well, she told me that John didn't have any money. I said, "He's got a little money." She says, "No, he hasn't." I said, "Yes, he has." And she said, "Well, he's got to put it on the table and show what he's got, because she's got to have security." And I said, "Well, he's got a little," [56] and she says, "Well, he's got to buy an apartment house and a home and a car and give her $5,000." I says, "Well, he hasn't got that kind of money."

By Counsel: We will ask that the answer be stricken on the ground that it is hearsay.

(Testimony of Lula Fitsos)

By Hearing Officer: The motion is denied.

Q. (Examining Officer to Witness): Did she state for what reason or upon what conditions that it was necessary for John to have this money?

A. She didn't say. Oh, I think she said that she had to have security.

Q. By "she," who do you mean?

A. Ida—that Basil—that John's wife had to have security.

Q. This security was required for what reason—— A. I don't know.

Q. What was the condition resulting from the presentation of this security—if John presented this security, what was to be the results?

A. Well, she would marry him in the Greek Church——

By Counsel: Just a moment—just a moment. To which we will object upon the ground that the question is leading and suggestive.

Q. (Hearing Officer to Witness): Were you told by respondent's sister-in-law what the result would be if the security were present?

A. Yes.

Q. Well, what did she say?

A. That she would be married by the Greek—in the Greek Church.

By Hearing Officer: Counsel's objection is overruled. Proceed, Mr. Lay.

Q. (Examining Officer to Witness): By "she" would be married in the Greek Church, to whom are

(Testimony of Lula Fitsos)

you referring? A. John's wife.

Q. The respondent in this proceeding?

A. Yes, uh-huh. [57]

By Examining Officer: I have no further questions of the witness.

By Hearing Officer: Your witness, counsel.

Q. (Counsel to Witness Lula Fitsos): Mrs. Fitsos, as I understand, you first became acquainted with John Fitsos in about 1926—is that correct?

A. Yes, uh-huh.

Q. And then you maintained your relationship with him off and on over the years either by seeing him personally or through correspondence with you or your husband? A. Yes.

Q. And you mentioned that you hadn't seen him for about 16 years before his arrival in April of 1950? A. Yes.

Q. But you had had letters from him or your husband had had letters from him in that 16 years?

A. Oh, sure.

Q. And I suppose you had written him letters from time to time?

A. I hadn't, but my husband had.

Q. And when your husband would receive letters from his brother, John, would he read them to you?

A. Well, he would tell me what he said.

Q. And then would advise you that he was answering the letter? A. No.

Q. Did he ever tell you whether he answered his brother's letters? A. No.

(Testimony of Lula Fitsos)

Q. Did you ever see him write letters to his brother during that 16-year period? A. Yes.

Q. In any event, when John Fitsos arrived at your home some time in April of 1950 your relationship with him was quite friendly? A. Sure.

Q. And as I understand you had occasion to see the respondent on but these three successive Sundays? A. Yes. [58]

Q. And I believe you said that on each of those Sundays rather bitter argument ensued and the talk was loud to the end that on the last Sunday you asked her to leave? A. Yes.

Q. You did not speak Greek, I believe you said?

A. No.

Q. And you didn't understand Greek?

A. No.

Q. And as far as you know did she speak English? A. No.

Q. Do you know whether or not she seemed to understand English? A. I don't think so.

Q. So your relations with her were rather nominal because of your inability to converse?

A. That's right.

Q. And you never got particularly friendly or close to her? A. No.

By Counsel: I have nothing further.

Q. (Hearing Officer to Examining Officer): Any further questions, Mr. Lay?

A. Nothing further.

By Hearing Officer: The witness is excused.

It has been agreed here off the record between

counsel and Examining Officer and all parties concerned that hearing be continued until 9:00 a.m. February 8, 1951.

(Hearing continued.)

The respondent is at liberty under bond in the sum of $1,000, residing at 813 South Mariposa Avenue, Los Angeles 5, California. [59]

I Certify the foregoing to be a true and correct transcript of the recording made of the testimony taken in the above case, to the best of my understanding.

/s/ CARON RHODES,
Stenographer.

I Certify that, to the best of my knowledge and belief, the foregoing record is a true report of everything that was stated during the course of the hearing, including oaths administered, the warnings given to the alien or the witnesses, and the rulings on objections, except statements made off the record.

/s/ ALFRED E. EDGAR, JR.,
Hearing Officer. [60]

United States Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

File No. A7 451 818

CONTINUED DEPORTATION HEARING

Date: February 8, 1951.

Place: Los Angeles, California.

Persons Present:

Alfred E. Edgar, Jr., Hearing Officer.
Richard L. Lay, Examining Officer.
Phyllis E. Wintroub, Stenographer.
Stephen Handras, Greek Interpreter.
Robert S. Butts, Attorney at Law.
Basiliki Andre Giannoulias, Respondent.

In the Case of:

BASILIKI ANDRE GIANNOULIAS or YIANNOULIAS.

Hearing Officer to Interpreter:

Q. Please stand and raise your right hand and be sworn. Do you solemnly swear that you will accurately translate from English to Greek and from Greek to English, to the best of your ability, all questions and answers and other material in this proceeding, so help you God? A. I do.

(Testimony of Respondent.)

Hearing Officer to Respondent Through Interpreter:

Q. Are you the same Basiliki Andre Giannoulias who last appeared before me in deportation proceedings on January 4, 1951? A. Yes.

Q. Will you please stand and raise your right hand and be sworn? Do you solemnly swear that the statements you are about to make in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God? A. Yes.

Hearing Officer to Examining Officer: You may proceed, Mr. Lay.

Examining Officer to Respondent Through Interpreter:

Q. Are you the same Basiliki Andre Giannoulias who appeared before Inspector Gunther of this Service at Los Angeles, California, on October 27, 1950, and gave a sworn statement concerning your immigration status in the United States?

A. Yes.

Q. At this time I show to you and counsel a typewritten transcript of the statement identified as the sworn statement of Basiliki Giannoulias given [61] before Inspector Gunther as indicated above and ask you if that is a transcript of the statement you have just stated you made?

A. Yes, it is correct.

Q. Were all the answers you gave to the ques-

(Testimony of Respondent.)

tions as contained in this transcript true and correct to the best of your knowledge and belief?

A. It is the truth, yes.

Examining Officer to Hearing Officer: At this time I offer the transcript of sworn statement described here for introduction into the evidence in this proceeding.

Hearing Officer to Respondent Through Interpreter: Transcript of sworn statement made at Los Angeles, California, October 27, 1950, in this case is received in evidence as Exhibit No. 5.

Hearing Officer to Examining Officer: You may proceed, Mr. Lay.

Q. (Examining Officer to Respondent Through Interpreter): Do you still have the Greek Passport that was described in the statement now made Exhibit 5?

A. I have it but I don't have it with me.

Q. Are you willing to send the passport to this office for retention in our file during the continuance of this proceeding at the earliest possible date?

A. Yes.

Q. In Exhibit No. 5 you testified that you secured an immigration visa for entry into the United States at Nassau, Bahamas. At this time I show you Foreign Service No. 256a, Application for Immigration Visa and Alien Registration, stamped with Alien Registration No. 7451818 and bearing Serial No. I-619311 and ask you if that is your signature contained in that form on the bottom of the page identified as signature of applicant?

(Testimony of Respondent.)

A. Yes, this is my signature.

Q. And are you the person who furnished the information from which this form was completed on April 4, 1950? A. Yes, the one.

Q. This form has been completed on the reverse thereof to indicate that Section [62] 4(a), Non-Quota Visa No. 182, was issued to the applicant at Nassau, Bahamas, on April 11, 1950, and was endorsed to show admission to the United States at the Port of Miami, Florida, on April 13, 1950, under Section 4(a) of the Immigration Act of 1924. Is that a true and correct record of your last admission to the United States? A. Yes.

Q. And is that the one time you have ever entered the United States? A. Yes.

Q. And for what purpose were you coming to the United States on the occasion of your admission on April 13, 1950?

A. To get married and remain here.

Q. Have you resided continuously in the United States since your admission on April 13, 1950?

A. Yes.

Q. There is attached to the form just identified by you numerous documents in support of such application. Do these attached documents all relate to you and your application for visa? A. Yes.

Q. And is the marriage certificate attached thereto a true and correct record of your marriage to John Fitsos to which you testified in the statement now made Exhibit 5?

(Testimony of Respondent.)

A. I don't know if this is the one because he was the one who was getting all the papers.

Q. Will the interpreter translate the material contained in that document and will the respondent state whether those are true facts as relating to her marriage with John Fitsos? A. It is true, yes.

Examining Officer to Hearing Officer: At this time I offer the form described here, together with the attached documents, for introduction into the evidence in this proceeding.

Hearing Officer to Respondent Through Interpreter: Form 256a, Foreign Service, Serial No. I-619311, in the case of Basiliki Fitsos, nee Giannoulias, is received in evidence and marked Exhibit No. 6.

Hearing Officer to Examining Officer: You may proceed, Mr. Lay. [63]

Q. (Examining Officer to Respondent Through Interpreter): Are you now or have you ever been affiliated in any manner with any organization which believes in and teaches the overthrow of the Government of the United States by force or violence? A. Never.

Q. What organizations do you now belong to?

A. I belong to an organization of the Greek Orthodox Church.

Q. Is that the only one? A. Only one.

Q. What organizations have you in the past belonged to either in the United States or any other country? A. None.

Q. Have you ever been a member of the Com-

(Testimony of Respondent.)

munist Party? A. No.

Q. Do you believe in Communism?

A. No.

Q. Is your marital status still the same as that to which you testified before Inspector Gunther on October 27, 1950? A. It is the same.

Q. Do you have any children? A. No.

Q. Is there anyone in the United States dependent upon you in any manner for support and maintenance? A. From me, no, nobody.

Q. Are you employed at the present time?

A. Now I have employment. I am working in a home.

Q. For whom are you working and what is the address?

A. Mr. and Mrs. Gail Patrick Jackson, 203 La Brea Terrace, Los Angeles.

Q. What kind of work do you do?

A. Housework, housekeeping, ironing and washing.

Q. What is your average weekly income from this employment?

A. $25.00 a week and room and board.

Q. How long have you been employed there? [64]

A. The last three months.

Q. Is that the only employment you have had in the United States?

A. This is the only employment.

Q. Other than this employment, how have you been maintained in the United States?

A. My brother was supporting me.

(Testimony of Respondent.)

Q. Have you ever been supported by charity or relief? A. No.

Q. Have you ever been confined in a hospital with any illness either physical or mental?

A. Never.

Q. What is the condition of your health at the present time as far as you know?

A. I am well.

Q. Are you able to travel? A. I am.

Q. What property or assets do you own in the United States?

A. In my bank, as I have deposited in my previous statement, I have $2,000.

Q. And is that the only assets that you own in the United States?

A. No, nothing else. That's all.

Q. Do you own any property or assets in any other country? A. In Greece.

Q. What property or assets do you own there?

A. We have plenty real estate property.

Q. By we, of whom are you speaking?

A. Myself, my mother, and my brothers and sisters.

Q. Approximately what is the value of the real estate property, of your interest in real estate property, that you own in Greece?

A. I can't figure out what is the present value. I don't know the conditions, they're always changing.

Q. Do you know the value of your interest in the property at the time you left Greece?

(Testimony of Respondent.)

A. My share is less than $2,000.

Q. Have you ever been arrested by the police or other similar authorities for [65] any crime or misdemeanor either in the United States or in any other country? A. Never.

Q. At this time I show to you and counsel Federal Bureau of Investigation Form indicating that a search of your fingerprint record on the basis of fingerprints furnished by this Service of you. They have no crime record in your case and I ask you if you are satisfied this record relates to you?

A. Yes.

Examining Officer to Hearing Officer: At this time I offer the form described for introduction into the evidence in this proceeding.

Hearing Officer to Respondent Through Interpreter: Negative Fingerprint Kick-Back from the Federal Bureau of Investigation in this case is received in evidence and marked Exhibit No. 7.

Q. (Examining Officer to Respondent Through Interpreter): In your sworn statement, which has been made Exhibit No. 5 in this proceeding, you testified that your ex-husband had at one time filed for annulment of your marriage to him. Do you know where this action was taken by your ex-husband, John Fitsos?

A. I don't know where he started the proceedings but he brought me home one day all the papers and he told me take this, get out of here, without giving me more explanation.

Q. At this time I show you certified photostatic

(Testimony of Respondent.)

copies of a Complaint for Annulment of Marriage, No. D398670, in the Superior Court of the State of California in and for the County of Los Angeles, showing John Petros Fitsos, Plaintiff, vs. Basiliki Andre Fitsos, with aliases, and ask you if you believe this record relates to the annulment proceedings to which you testified in Exhibit 5?

A. Yes, these are the papers.

Examining Officer to Hearing Officer: At this time I offer the certified copies of the record identified by the respondent for introduction into the evidence in this proceeding.

Q. (Counsel to Examining Officer): If we understand the purpose of this offer is limited to the purpose of proving the institution of the proceedings in question and not for the purpose of proving the truth of the allegations contained in the [66] papers. Is the offer so limited, Mr. Lay?

A. It is offered solely for the purpose of showing that the proceedings had been filed and were at one time pending and do not contain any proof on allegations; however, it is expected by this Service to produce further evidence pertaining to the material in this allegation and while this is not offered as proof of the allegations, it is offered as proof that the allegations were made.

No objection.

Hearing Officer to Respondent Through Interpreter: Certified copy of the record identified by Examining Officer and respondent received in evi-

(Testimony of Respondent.)

dence in this proceeding and marked Exhibit No. 8.

Hearing Officer to Examining Officer: You may proceed, Mr. Lay.

Q. (Examining Officer to Respondent Through Interpreter): Also in Exhibit No. 5 you testified that there had been instituted divorce proceedings regarding the marriage of yourself and John Fitsos at Las Vegas, Nevada. At this time I show you certified copy of Complaint for Divorce, Case No. 49887, Department No. 2, in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, filed September 8 at 9:47 a.m., 1950, showing Basiliki Andre Fitsos, Plaintiff, vs. John Petros Fitsos, Defendant, and ask you if that document relates to the divorce proceedings to which you testified in Exhibit No. 5?

A. Yes, this is the exact one.

Examining Officer to Hearing Officer: At this time I offer the described document for introduction into the evidence in this proceeding.

Hearing Officer to Respondent Through Interpreter: Certified copy of Complaint for Divorce described by the Examining Officer and identified by the respondent is received in evidence and marked Exhibit No. 9.

Q. (Examining Officer to Respondent Through Interpreter): At this time I show you a photostatic copy of a Decree of Divorce referring to the same Case Number and Department Number, the same Court, listing [67] the same plaintiff and defendant, and ask you if this is a true and correct

(Testimony of Respondent.)

record of the Decree of Divorce of yourself from John Fitsos to which you testified in Exhibit No. 5?

A. Yes, this is.

Examining Officer to Hearing Officer: At this time I offer the photostatic copy of document described here for introduction into the evidence.

Q. (Hearing Officer to Counsel): Counsel, this copy is not certified. Do you have a certified copy in your file? A. Yes, I do have.

Q. You are satisfied this is the same then?

A. Yes.

Hearing Officer to Respondent Through Interpreter: Very well. Photostatic copy of Decree of Divorce, identified by Examining Officer, is received in evidence as Exhibit No. 10.

Q. (Examining Officer to Respondent Through Interpreter): When did you first agree to marry John Fitsos?

A. When my brother came to Greece in September, 1949, and he told me about him.

Q. Had you ever seen John Fitsos prior to entering into this agreement?

A. I have never seen him before.

Q. Do I understand from your prior answer that this agreement was first suggested to you by your brother upon his visit to Greece in September, 1949?

A. Yes, he came with a picture of John Fitsos and introduced him to me in that picture.

Q. Between that time and the time you entered into the marriage with John Fitsos, did you correspond with him?

(Testimony of Respondent.)

A. Yes, we did correspond.

Q. Can you state approximately how many letters you received from him between the time your brother mentioned this agreement and the time you left Greece to enter into the marriage?

A. I received less than ten letters. I started corresponding with him after my brother came back here and he concluded the marriage transaction. In the meantime I was corresponding with my [68] brother.

Q. And how many letters did you write to John Fitsos approximately during that period of time?

A. I don't remember very well; about six or seven.

Q. In your letters to John Fitsos did you write about the marriage agreement? A. Yes.

Q. Was it decided by correspondence where you should meet to enter into this marriage?

A. Yes, we agreed we would meet in Bahamas but our marriage would take place in Los Angeles.

Q. Why did you believe it was necessary to meet in the Bahamas if your marriage was to take place in Los Angeles, California?

A. Because he could not bring me directly to Los Angeles.

Q. Was the purpose of going to the Bahamas in order that you might enter into a marital agreement there so that you might apply for admission into the United States as the wife of a United States citizen? A. Yes.

Q. Was the Bahamas the first place agreed upon

(Testimony of Respondent.)

between you and John Fitsos where you would meet and be married? A. Yes.

Q. Then was your sole purpose in going to the Bahamas for the purpose of entering into a marriage with John Fitsos?

A. Yes, this was the only purpose.

Q. How long were you in the Bahamas before you entered into the marital agreement as shown in Exhibit No. 6 with John Fitsos?

A. I don't remember; maybe one week, I don't remember. I left Greece the 19th, I arrived the 21st of March and the 27th was the marriage agreement entered.

Q. How long before the marriage on March 27th did John Fitsos arrive in Nassau, Bahamas, if you know?

A. He arrived in Nassau two days after I arrived myself; about the 23rd he arrived.

Q. And did you meet and talk with John Fitsos in Nassau prior to your marriage?

A. Surely. I also met and talked to him every day.

Q. During the period you were corresponding with him or talking to him in Nassau, was there any discussion as to the conditions under which the marriage would be entered into, that is, was there a discussion as to the home that he would furnish you after your marriage? [69]

A. We have both agreed by correspondence as well as verbally that we were going to get married and settle in Los Angeles.

(Testimony of Respondent.)

Q. By that do you mean that it was the agreement between the two of you that your future home in the United States would be in Los Angeles, California? A. Yes, this is right.

Q. Was there any agreement prior to the marriage as to any property settlement; that is, was he to furnish you with any property, money, or anything in that nature as part of your marriage agreement?

A. He promised that he was going to give me a home in Los Angeles. I did not ask for the money.

Q. Did you ever at any time prior to the marriage to John Fitsos request that any certain sum of money would be placed in your name and at your disposal as part of the marriage agreement?

A. No, I did not ask anything.

Q. Did you ask that he purchase any property and place the deed to this property or title thereto in your name as part of the agreement?

A. No.

Q. Did you make any of these requests for money or property settlement after you entered into the marital agreement at Nassau, Bahamas, on March 27th?

A. No, I never asked him anything and he never even gave me $2.00.

Q. At the time you left Greece to go to the Bahamas, was it your intention to then continue your journey and enter the United States to live following your marriage there?

(Testimony of Respondent.)

A. Certainly, yes. I was to follow my husband where he was going.

Q. And was it your understanding at the time you left Greece that your marriage to John Fitsos at the Bahamas would facilitate or make easier your entry into the United States?

A. He brought me to Bahamas in order to bring me from there to the United States.

Q. And did you believe that the purpose of your marriage in the Bahamas was to facilitate your entry into the United States as the wife of a United States citizen?

A. The purpose of my going to the Bahamas was mainly to get married. Myself, I was in Greece waiting for my regular quota to come to the United States.

Q. How long had you desired to come to the United States?

A. Fourteen years I have been waiting.

Q. At the time you left Greece did you believe that you would be able to enter the United States for permanent residence without entering into a marital agreement with a United States citizen? [70]

A. Certainly, yes. I had been waiting for my visa.

Q. Had you been notified that the visa would soon be available to you?

A. The American Consul in Greece had promised me that I was among the first to come to the United States and my visa was coming up.

Q. When did he promise you this?

(Testimony of Respondent.)

A. He has written me about it, the American Consul, and also he verbally told me so in December, 1949.

Q. Do you have any of your correspondence you received from the American Consulate concerning your visa application?

A. I don't have anything with me, probably in Greece.

Q. For what reason were you willing to enter into a marital arrangement with a person you had never seen?

A. By correspondence he brought me here. I don't know what to say.

Q. Did you enter into this marital agreement for the purpose of facilitating your admission into the United States?

A. No, I married him because I liked him as a husband and with the aim of getting married.

Q. At the time you married John Fitsos in the Nassau, Bahamas, was it your intention to live with him as man and wife following the marriage?

A. Yes, yes, yes.

Q. Why did you not live with John Fitsos as man and wife following your marriage on March 27, 1950?

A. Because this was against our religious beliefs and I have been waiting to get married in the Greek Orthodox Church.

Q. Did you regard the marriage ceremony at Nassau, Bahamas, as a legal and binding marital agreement upon you?

(Testimony of Respondent.)

A. Certainly, I did believe.

Q. Did John Fitsos, following the marriage ceremony on March 27, 1950, express to you a desire to assume the relationship of man and wife following that marriage?

A. No, he did not express any desire but he abided by the agreement we made with my brother that we were going to get married in the Greek Orthodox Church in Los Angeles.

Q. Why did you make an agreement to come to Los Angeles and get married in the Greek Church rather than getting married in the Greek Church in Nassau, Bahamas, immediately following the ceremony?

A. Because his relatives as well as mine were here in Los Angeles and we had nobody in Bahamas to assist in our marriage. [71]

Q. At any time prior to your arriving in Los Angeles, California, did John Fitsos express a desire to be married in the Greek Orthodox Church at any other place?

A. No, he didn't express a desire.

Q. Was this agreement between the two of you to be married in the Greek Church in Los Angeles arrived at prior to your leaving Greece or was it arrived at prior to your arriving in the Bahamas?

A. He wrote me in Greece and also when I arrived in Bahamas he repeated that we were going to get married in the Greek Church in Los Angeles. And we arrived Miami together and immediately he

(Testimony of Respondent.)

left for New York and he shipped me to Los Angeles.

Q. Which one of you first suggested the agreement that you would be married in the Greek Church in Los Angeles?

A. Himself. Myself. I don't know anything.

Q. At the time your brother mentioned this marital agreement on his visit to Greece in September, 1949, did he suggest or mention in any way the arrangement whereby you would be married in Los Angeles, California, in the Greek Church?

A. Fitsos wrote my family, to my brother, that he was going to meet me in Nassau and from there he was going to bring me and marry me in Los Angeles in the Greek Church.

Q. The question was, did your brother mention it to you at the time he visited you in Greece?

A. My brother did not know about it while he was in Greece but when he came back here he agreed with Fitsos and Fitsos wrote me.

Q. Did you at any time following the civil ceremony of marriage at Nassau, Bahamas, on March 27, 1950, refuse to assume a marital relationship of man and wife with John Fitsos?

A. I knew I was his wife.

Q. The question was, did you at any time following that ceremony refuse to assume the relationship of man and wife with John Fitsos?

A. From our marriage we have been here together but we are living in separate quarters and

(Testimony of Respondent.)

he never asked me nor I ever asked him for any conjugal relationship.

Q. Then your answer is that you never did at any time refuse to live with him as man and wife, is that correct?

A. No, I never refused him at all.

Q. After your arrival at Los Angeles following your entry at Miami, Florida, did John Fitsos come to Los Angeles? [72]

A. He came after one week. One week after my arrival.

Q. Following his arrival in Los Angeles, where you were then living, did you enter into a marital ceremony in the Greek Orthodox Church as stated you previously planned?

A. When he came to Los Angeles, he did not come to see me at all. He went straight to his brother. He saw me much later on.

Q. Did he contact you by telephone or in any manner upon his arrival in Los Angeles?

A. When he came he did not come to see me but when I heard he was in town I was calling him repeatedly over the telephone and even my brother was calling him to come and take me out. I was going with my brother to meet him and the one time he came was when he gave me the papers and told me, here, read them.

Q. Did you at any time in Los Angeles discuss with John Fitsos whether you would be married in the Greek Orthodox Church here?

A. I repeatedly was asking him, John, when are

(Testimony of Respondent.)

we going to get married in church, and he was telling me, we'll see about it, take it easy. In the meantime he was living with his brother.

Q. You have just testified that you could not contact him by telephone and that he refused to see you and that the only time you saw him was when he served papers of annulment upon you, how could you have repeatedly asked him when you were going to get married if you never talked to him?

A. I said that I was seeing him when I was going with my brother to see him, but he never came to see me except the only time when he brought me the papers.

Q. Where did you see him in company with your brother?

A. In his brother's home. I was visiting him together with my brother and my brother was begging him to come and take me out, but he never came.

Q. What is the name of the brother of John Fitsos in whose home these discussions took place?

A. George Fitsos.

Q. Was George Fitsos present at the time you and your brother had these discussions with John Fitsos?

A. Yes, George was present when we visited John in their house.

Q. And did he take part in these discussions that you had with John?

A. Yes, George was present when my brother asked John to take me with them. Once when they

(Testimony of Respondent.)

said they were going to Santa Barbara to take me with them.

Q. After your arrival at Los Angeles, did John Fitsos ever on any occasion express a willingness to go through the marriage ceremony in the [73] Greek Orthodox Church with you?

A. No, he never showed any interest. He didn't even come to see me.

Q. Did you ever on any occasion tell John Fitsos not to mention to other people that you had gone through a civil ceremony of mariage with him in Nassau? A. No, I never mentioned it.

Q. Were you at all times willing to assume the relationship of man and wife with John Fitsos following your marital ceremony in Nassau?

A. Certainly, yes.

Q. In your presence did your brother or anyone else ever make any demands upon John Fitsos as to property and money he should give to you before you would enter into a marital relationship with him as man and wife? A. No, never, nothing.

Q. Was the annulment proceedings, the record of which you have identified here, pending in the Los Angeles Court at the time you filed your Complaint for a Divorce in Las Vegas, Nevada?

A. He had started the proceedings and he brought me the papers and said to me, here, do what you want with them.

Q. Why did you file Complaint for Divorce in Las Vegas, Nevada, while the annulment proceedings were pending here in Los Angeles?

(Testimony of Respondent.)

A. When he took me the papers I took the papers to a lawyer and the lawyer told me that this fellow has abandoned you sister. The best thing for you to do is to get a divorce.

Q. Did the lawyer at that time advise you that if the annulment was granted it might have an adverse effect upon your immigration status in the United States?

A. No, the lawyer did not advise us anything like this. He only advised us that John Fitsos has abandoned me.

Q. Did you file a Complaint for Divorce in order to stop the annulment proceedings then pending in Los Angeles?

A. He started the proceedings and he served me with the papers.

Q. The record shows you started the proceedings at Las Vegas and the question was, did you start them for the purpose of stopping the annulment proceedings then pending in Los Angeles?

A. They have advised us that other people were going there and getting their divorce.

Q. (Hearing Officer to Respondent Through Interpreter): You have not answered the question. Please answer the question yes or no?

A. No. [74]

Examining Officer to Hearing Officer: Inasmuch as one John Peter Fitsos has previously been identified in this record as the ex-husband of the respondent and the other party to the marriage in question or in issue in this proceeding, I desire at

(Testimony of Respondent.)

this time to offer transcript of sworn statements identified as statements of John Peter Fitsos given at Washington, D. C., before an officer of this Service on September 14, 1950, and again on January 12, 1951, for introduction into the evidence in this proceeding.

Counsel to Hearing Officer: I have no objection to the introduction of these statements with, of course, the reservation for the opportunity by depositions or interrogatories to cross-examine the witness at Washington at a time to be set by the Service.

Hearing Officer to Respondent Through Interpreter: Subject to further identification by the witness through the taking of a deposition, which will also provide counsel an opportunity to cross-examine the witness, these statements are marked as exhibits for identification only and the statement, dated September 14, 1950, is marked Exhibit No. 11 and the statement taken January 12, 1951, is marked Exhibit No. 12.

Q. (Hearing Officer to Examining Officer): Do you have anything further to present, Mr. Lay?

A. In view of the counsel's request for the cross-examining, I have nothing further at this time.

Q. (Hearing Officer to Counsel): Counsel, before we go to the matters of the deportation, do you have any questions you would like to ask of the respondent here to clear up anything that has gone on up to this point?

A. I think not at this point. I would, however,

(Testimony of Respondent.)

at a later date when the evidence is in and particularly with respect to any additional testimony of Mr. Fitsos. I desire then to ask the witness certain questions in clarification and also in rebuttal but I think it would be more orderly to have it at a definite time if the Hearing Officer has no objection to that.

Q. (Hearing Officer to Respondent Through Interpreter): Is your mother still residing at Kato Kleitoria, Calauryta, Greece?

A. Yes, she still lives there. [75]

Q. Did you ever see John Fitsos at your home in Greece prior to your marriage?

A. No, never.

Q. What was the reason for meeting him in Nassau, Bahamas, rather than in your home town in Greece?

A. He never came to Greece to meet each other.

Q. What was the reason for his not going to Greece?

A. I don't know why he didn't come to Greece. He invited me from here.

Q. How long has your father been deceased?

A. Fifteen years.

Q. How were you supported in Greece prior to your marriage?

A. We have been living off our property in Greece. My brother was sending us also money.

Q. In your opinion was John Fitsos at any time indifferent to you following your marriage in Bahamas?

(Testimony of Respondent.)

A. He didn't show indifference until and up to the time he came to Los Angeles. Before that we was living all right.

Q. Do you have any explanation for his indifference to you after you both arrived in Los Angeles?

A. I don't know but I suspect his brother had some information on him because ever since he came to Los Angeles and my brother called Fitsos' brother by phone, Fitsos' brother never came to see me.

Q. The Attorney General may, in his discretion, grant to qualified deportable aliens certain privileges in relief from deportation. The first is the privilege of departing from the United States voluntarily at their own expense in lieu of deportation. The second is the privilege of departing from the United States in lieu of deportation with the additional privilege of pre-examination of their admissibility to the United States. In both cases, in order to prove that they are eligible, the aliens must prove good moral character for the past five years and pre-examination is only granted where the alien intends to make an application to an American Consul or officer in Canada for an immigration visa to immigrate to the United States for permanent residence. The Attorney General may also grant suspension of deportation to deportable aliens who prove good moral character for the past five years and, in addition, prove that their deportation would result in a serious economic detriment to a parent, a spouse, or a minor child, or establishes that they have resided

(Testimony of Respondent.)

in the United States for seven years or more and resided here on July 1, 1948. Do you understand?

A. Yes, I understand. [76]

Q. (Hearing Officer to Examining Officer): Now, Mr. Lay, do you have anything further to say?

A. No.

Q. (Hearing Officer to Counsel): Mr. Butts, do you? A. No, I do not.

Hearing Officer to Respondent Through Interpreter: The hearing in this case will be continued to permit the taking of the deposition from one John Petros Fitsos in Washington, D. C., on a date to be determined by the Officer in Charge of this Service in that city. There will be a Hearing Officer there designated from the Immigration Service and an Examining Officer, and the respondent may be represented by counsel there or may be represented by the submission of written interrogatories. A reasonable advance notice will be given to the respondent and counsel as to the date, time, and place of the taking of the deposition.

Q. (Hearing Officer to Counsel): Is counsel in a position to state at this time whether he will be present there?

A. Yes, we will be represented. I will not be present but we will be represented. I don't know until I have talked with the respondent's brother whether it will be our regular counsel or whether it will be somebody that the brother selects, but there will be counsel present and if we can have as

(Testimony of Respondent.)

much as seven days' notice that will be adequate to have them arrange their case.

Q. Are you willing to advise this office as to who will represent the respondent in Washington, D. C., as soon as you have made the arrangements?

A. Yes, I surely will.

Q. Then we will be in a position to advise them and they can serve notice there in that event.

A. I will do that.

(The hearing is continued.)

I certify that, to the best of my knowledge and belief, the foregoing record is a true report of everything that was stated during the course of the hearing, including oaths administered, the warnings given to the alien or the witnesses, and the rulings on objections, except statements made off the record.

/s/ ALFRED E. EDGAR, JR.,
Hearing Officer. [77]

I certify that the foregoing is a true and correct transcript of my shorthand notes as taken by me in Books 102011 and 102009.

/s/ PHYLLIS E. WINTROUB,
Stenographer. [78]

United States Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

Alien File No. A7 451 818

CONTINUATION OF DEPORTATION PROCEEDINGS

Place of Hearing: Los Angeles, California.

Date of Hearing: April 16, 1952.

Persons Present:

Hearing Officer, Alfred E. Edgar, Jr.
Examining Officer, Richard L. Lay.
Stenographer, Caron Rhodes.
Greek Interpreter, Mrs. Christine Bonos.
Respondent, Basiliki Andre Giannoulias.

In the Case of:

BASILIKI ANDRE GIANNOULIAS or YIANNOULIAS.

Hearing Conducted in the Greek Language Through Interpreter, and Recorded by Dictaphone.

Hearing Officer to Interpreter:

Q. Will you please stand and raise your right hand and be sworn, please? Do you solemnly swear that you will correctly translate to the best of your ability all the questions and answers and other material in this proceeding from English to Greek and from Greek to English, so help you God?

(Testimony of Respondent.)

A. Yes, I do.

To Respondent (Through interpreter throughout proceedings):

Q. Will you please stand and raise your right hand and be sworn. Do you solemnly swear that all the testimony you are about to give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God? A. Yes.

Q. (To Examining Officer): Are you ready to proceed, Mr. Lay? A. I am.

Q. You may proceed.

Examining Officer to Respondent (Through interpreter throughout proceedings):

Q. Are you the same Basiliki Andre Giannoulias who appeared—who last appeared for a hearing in this office on February 8, 1951? A. Yes. [79]

Q. Have you been outside of the United States since your last appearance here on that date?

A. No.

Q. Have you been arrested by the police or similar authorities since that appearance?

A. No.

Q. What is your present residence address?

A. 4639 Saturn Street, Los Angeles 19. I work for Puritan Candies, 8988 Venice Boulevard, Culver City.

Q. What kind of work do you do there?

A. Cut candies and prepare them for packing.

Q. What is your average weekly income from your employment? A. $35.00 a week.

(Testimony of Respondent.)

Q. How long have you worked there?

A. Five months.

Q. Is there anyone other than yourself in the United States at the present time dependent upon you for support and maintenance? A. No.

Q. Are there any material changes in your assets and liabilities since your last appearance here?

A. With my brother I have $5,000 in the bank. I suppose it is a change.

Q. Do you mean that you have a joint account with your brother in the amount of $5,000 now?

A. Yes.

Examining Officer to Hearing Officer: At this time I offer the deposition ordered by the Hearing Officer in this case on February 8, 1951, for introduction into the evidence in this proceeding. The deposition consists of typewritten Pages 1 to 29, inclusive.

I also request that Exhibit A of this deposition be recognized as a part of Exhibit 6, already a part of this record, and that Exhibits B and C of this deposition be recognized as Exhibits 11 and 12 of this record for identification purposes only, and that these Exhibits for Identification now be introduced into the evidence in this proceeding.

Counsel: Exhibit A is the marriage certificate. Can you tell me, counsel, without my going through the deposition what the other exhibits are that you referred to? [80]

Examining Officer: Exhibits 11 and 12 for identification were sworn statements of Peter Fitsos

(Testimony of Respondent.)

that were previously introduced for introduction on the basis of the deposition in Washington.

Counsel: I have no objection.

Hearing Officer: Very well. Deposition offered by the Examining Officer is received in evidence and marked Exhibit No. 13, and Exhibits 11 and 12 previously marked for identification are received in evidence then as Exhibits 11 and 12.

Q. (To Examining Officer): Anything further, Mr. Lay?

A. Yes, I have a few more questions of the respondent.

Q. Proceed, please.

Q. (Examining Officer to Respondent): You have previously testified here that you had been an applicant for an immigration visa for 14 years prior to your entry into the United States. Is that correct? A. I intend to stay here forever.

Q. I don't think you understood my question. You previously testified that prior to your coming to the United States you had been an applicant for a visa from an American Consul, and that application had been pending for about 14 years. Is that right? A. Yes.

Q. Where is the American Consulate located at which you had your application pending for a visa to enter the United States prior to your coming here? A. In Athens.

Q. In Athens, Greece?

A. In Athens, Greece.

(Testimony of Respondent.)

Q. Were you an applicant for a quota immigration visa? A. Yes.

Q. Under what name did you apply for a quota immigration visa in Athens, Greece, before the American Consul? A. Basiliki Giannoulias.

Examining Officer to Hearing Officer: In the prior record of this proceeding the respondent has testified concerning the availability of a quota immigration visa at the time of her last entry into the United States. At this time I offer for introduction into [81] the evidence in this proceeding an official communication signed by W. F. Kelly, Assistant Commisioner, Immigration and Naturalization Service, Washington, D. C., addressed to the District Director at this office, by which means there is forwarded copies of two documents. These documents attached thereto consist of a memorandum from the Department of State dated February 5, 1952, and a communication attached thereto from the American Embassy at Athens, Greece, dated January 25, 1952, relating to the status of the application of the respondent at that office for a quota immigration visa at the time she entered the United States on April 13th, 1950. (Shown to counsel.)

Counsel: I will object to the introduction of the documents upon the grounds that they are hearsay, and further upon the ground that they are incompetent to any material issues in this case.

Hearing Officer: Objection is overruled. The document offered by the Examining Officer is re-

(Testimony of Respondent.)

ceived in evidence and marked Exhibit No. 14. You may proceed, Mr. Lay.

Examining Officer: At this time I have no further questions of the respondent nor further evidence or witnesses to offer.

Q. (Hearing Officer to Counsel): Counsel, do you have any evidence to offer or witnesses to present?

A. Yes; at this time I should like to produce certain testimony from the respondent. May I proceed?

Q. You may proceed.

Counsel to Respondent (Through Interpreter Throughout Proceedings):

Q. Miss Giannoulias, are you acquainted with George Fitsos? A. Yes.

To Interpreter: Incidentally, Miss Interpreter, I want to mention that there are two Fitsos, George and John. So will you be sure to get the right first name when I ask a question?

Interpreter: Yes.

Q. (Counsel to Respondent): Did you ever make any statement to George Fitsos relative to a marriage ceremony between you and John Fitsos?

A. Yes. [82]

Q. Would you relate the statement or conversation which you had?

A. The conversation was to marry John Fitsos.

Q. Will you please, Miss Giannoulias, tell us any conversation, repeat any conversation, which you

(Testimony of Respondent.)

had with George Fitsos about a marriage ceremony between you and John Fitsos?

A. The agreement with George Fitsos was to marry John Fitsos at the Greek Church in Los Angeles.

Q. And did you have a conversation with George Fitsos in which what you have just related was said?

A. My conversation was with George Fitsos, at his house.

Q. Now, will you tell me what you said and what George Fitsos said about a marriage with John Fitsos?

A. My conversation with George Fitsos was to marry John Fitsos, his brother, at the Greek Church in Los Angeles.

Q. Now, did you ever tell Ida Giannas to call Lulu Fitsos in connection with your plan for marriage with John Fitsos?

A. I didn't say anything to nobody.

Q. Were you ever aware of a phone call between Ida Giannas and Lulu Fitsos in which Ida Giannas in speaking of John Fitsos said in substance and effect: "Well, he's got to put it on the table and show what he's got, because she's got to have security. Well, he's got to buy an apartment house and a home and a car and give her $5,000"?

A. I didn't hear anything like that.

Q. Did you ever tell anyone that you had to have security before you would marry John Fitsos in the Greek Church? A. I didn't say anything.

(Testimony of Respondent.)

Q. Do you recall having visited the home of Mrs. George Fitsos on three successive Sundays in 1950 shortly after you arrived in Los Angeles?

A. Yes, I did.

Q. Do you recall any discussions in which you were involved at the home of Mrs. George Fitsos on those Sundays?

A. The conversation was to marry John Fitsos in the Greek Church in Los Angeles.

Q. Who said that?

A. We both agreed with John—John and I agreed to marry each other.

Q. In the Greek Church at Los Angeles?

A. Yes. [83]

Q. And did the same kind of conversation occur on each of those three Sundays?

A. The same.

Q. Is there any custom in your native Greece with respect to arrangements for marriages of girls of a family? A. Yes, we have.

Q. What custom is there?

A. Our custom is for the father or the brother of either side to match the marriage.

Q. Did you ever tell John Fitsos concerning your marriage in Bahamas: "That was no marriage; it was not even an engagement"?

A. I didn't say anything.

Q. Did you ever make that statement which I have just related?

A. My agreement was to get married in Los An-

(Testimony of Respondent.)

geles, on account that in Bahamas was Lenten period.

Counsel to Interpreter: Well, now, just ask her to listen to this question, and you put the question directly to her, and asked her to answer.

Q. (To Respondent): Did you ever tell John Fitsos that, "That was no marriage, it was not even an engagement"? Answer that yes or no.

A. I didn't say anything.

Q. Did John Fitsos ever ask you to have a Greek Orthodox Church ceremony in the Bahamas?

A. No.

Q. When you were in the Bahamas, was that any religious season?

A. It was Lenten period, before Greek Easter.

Q. Is there any custom in the Greek Orthodox Church concerning having marriages during the Lenten season? A. Yes, there is.

Q. What is the custom?

A. The custom, according to the Greek religion, is not to get married during Lenten period. [84]

Q. Did you ever tell John Fitsos in California that you did not consider the Bahamas ceremony as a legal marriage? A. No.

Q. Did you and John Fitsos ever spend a night in the same room at Nassau?

A. The first night that he came.

Q. Was that before you were married?

A. Yes.

Q. Did he attempt to have sexual relations with you on that occasion? A. No.

(Testimony of Respondent.)

Q. Did he attempt to get in the same bed with you?

A. He did attempt, but I resisted, because I wasn't married to him yet.

Q. And after that did he take a separate room by himself before you were married?

A. No, he stayed in the same room. The next night he went in a separate room.

Q. All right. Then did he stay in a separate room after the next night?

A. He went into a separate room, because I won't stand sleeping with this man in the room on account I wasn't married to him.

Q. Did he ever come back to spend a night in the same room with you before you were married after this same night?

A. No, because he agreed with my opinion to wait until we are married.

Q. Now, did John Fitsos ever sleep in the same room with you after your marriage in the Bahamas?

A. No.

Q. After you were married in Nassau did he try to enter your bed? A. No.

Q. Did John Fitsos suggest having sexual relations with you after your marriage and did you make a reply: "John, I want you to respect me until we go through the Greek Orthodox Church," to which John Fitsos replied: "O.K., I will get out. I will show you I am a gentleman"?

A. He agreed to wait to get married in Los Angeles and have sexual relations.

(Testimony of Respondent.)

Q. Do you recall having had a conversation with John Fitsos in Nassau of the same effect which I have just quoted, and if you wish I will requote it? Do you recall having had a conversation with John Fitsos in Nassau, and [85] please answer yes or no whether you had this conversation: "John, I want you to respect me until we go through the Greek Orthodox Church"? A. Yes.

Q. After John Fitsos came to Los Angeles following your ceremony in Nassau, did he telephone you at your home? A. Yes, he called me.

Q. Did you ever say to him on the telephone, "Don't say nothing to nobody we married in Nassau, Bahamas. Don't say it to any Greek that we stayed together in the Bahamas, because that was no marriage"? A. No.

Q. Did you ever say to John Fitsos in effect with respect to the proposed church wedding in Los Angeles: "We got lots of time to get married"?

A. I told him we get married when he came.

Q. Did you ever say to him concerning the church wedding in Los Angeles: "We got lots of time to get married"? Answer yes or no.

A. When he came to Los Angeles, you mean?

Q. Yes. A. No.

Q. Did you ever ask John Fitsos to put $5,000 in your name? A. No.

Q. Did you ever ask him to give you an apartment house for five families? A. No.

Q. Did you ever ask him to buy any furniture?

(Testimony of Respondent.)

A. No.

Q. Did you ever ask him to buy an automobile?

A. No.

Q. Did you ever tell him that if he did not do those things that I have just stated, "I won't marry you through the Greek Orthodox Church"?

A. No.

Q. Do you recall going for an automobile ride with John Fitsos a couple of days after he arrived in Los Angeles following your marriage in Nassau?

A. Yes. [86]

Q. And who was present in the automobile besides yourself and John Fitsos?

A. My brother and sister-in-law.

Q. Is that Mr. and Mrs. Giannas? A. Yes.

Q. Will you tell us as nearly as you can recall what each of those people said in that automobile ride concerning a marriage ceremony to be performed in Los Angeles?

A. Our conversation was to get married in the Greek Church, and they all agreed.

Q. Did John Fitsos ever ask you in Los Angeles to come and live with him as his wife?

A. No.

Q. Did you ever tell him, "I will never come to live with you except you put the requirements"?

A. No.

Q. Did John Fitsos ever tell you that you were his wife and that he would like to have sexual relations with you and live as man and wife?

A. No.

(Testimony of Respondent.)

Q. Did John Fitsos ever offer to provide a place where the two of you could live together?

A. No.

Q. Did you ever tell John Fitsos that you didn't want to live in an apartment? A. No.

Q. Did John Fitsos ever come to visit you in your brother's house in Los Angeles? A. No.

Q. Did you ever refuse to let John Fitsos come to your brother's house and visit you? A. No.

Q. Did you ever refuse to go out with John Fitsos and say, in effect: "I won't go out until you put the money and the furniture and the automobile"? A. No.

Q. Did John Fitsos ever ask you to go with him to Washington, D. C.? A. No.

Q. Did he ever tell you that he wanted to go to Washington and go in business and rent an apartment? A. No.

Q. Did you ever say to him in effect: "What are you going to do with me in Washington, put me in a whorehouse, put me in a bad place"?

A. No. [87]

Q. When did you first hear of John Fitsos?

A. 1949 when my brother came to Greece.

Q. And did you first hear of John Fitsos from your brother? A. Yes.

Q. After that did you receive any letters from John Fitsos?

A. I received letters from him after my brother came to the United States in 1950.

Q. And did you write to him in response to let-

(Testimony of Respondent.)

ters he sent you? A. Yes.

Q. Over what period of time did your correspondence continue? A. One month.

Q. And about how many letters did he write you and how many did you write him?

A. I don't remember exactly, about four or five letters.

Q. And do you have with you in Los Angeles any of the letters which you received from John Fitsos?

A. I did not keep any of his letters.

Q. Do you have copies of the letters which you wrote to him? A. No.

Q. Please answer this question yes or no. Do you recall in substance what you told him in the letters you wrote to him? A. Yes.

Q. Now, do you recall generally what was contained in the letters which he wrote to you? Answer yes or no. A. Yes.

Q. Now, will you tell us in substance and effect in general what you said in your letters to John Fitsos and what he said in his letters to you?

A. He was writing to me that he saw my picture and that he wanted to marry me, and I was agreeing to that.

Q. What was your intention when you left Greece? A. To get married with him.

Q. And had you told that to Mr. Fitsos?

A. Yes.

Q. Now, please tell us in your own words generally what happened between you and John Fitsos from the time he arrived in the Bahamas until you

(Testimony of Respondent.)

were served with the annulment papers in Los Angeles, and stop as you go along so that the Interpreter can repeat your answer to the reporter?

A. He was agreeing to marry me until he came to Los Angeles. He came to my house to give me the papers for the divorce. [88]

Q. Well, now, will you please start in with the time when you met Fitsos in Nassau, and tell us everything that happened between you between that time and the time when you were served with the papers in Los Angeles, what you did, and what you said?

Examining Officer: I will have to object to the question, because I don't believe that a large majority of their doings have any bearing in this, and I would request that the interrogation be confined to information pertinent to this case.

Counsel: That's right, Mr. Lay. I will rephrase the question.

Q. (To Respondent): Tell us everything you did or said concerning the marriage in either Nassau or the proposed marriage in the Greek Church in Los Angeles between the time you first met him in Nassau and the time you were served with the papers?

A. My conversation with him was to marry him in the Greek Church, and it seems that he disagreed, therefore he brought the papers for a divorce.

Q. How long before you were married in Nassau was it that John Fitsos arrived there?

A. Two days before we got married.

(Testimony of Respondent.)

Q. Now, will you tell us in effect what you said and what John Fitsos said about your marriage in Nassau?

A. He said to marry me in Los Angeles.

Q. What did you say before you were married in Nassau about your marriage in Nassau, if anything?

A. We agreed to get married in Los Angeles and not in Nassau.

Q. Miss Giannoulias, will you please listen to my question, and answer the question I am asking you? Did you have any conversation with John Fitsos in Nassau about having any kind of a marriage ceremony in Nassau?

A. We didn't have any conversation regarding getting married in Nassau because I didn't know whether there was a Greek Church there or not.

Q. Did you have some kind of a marriage ceremony in Nassau?

A. We got married in Nassau legally.

Q. Now, before you got married in Nassau legally did you have any conversation with John Fitsos about that legal marriage?

A. Well, my conversation with Fitsos was to marry him religiously in the Greek Church in Los Angeles.

Q. Now, did you have any conversation in Nassau with him about getting married in a Greek Church in Nassau? A. No. [89]

Q. After you had had your marriage ceremony in Nassau, how long did you remain there?

(Testimony of Respondent.)

A. About three weeks.

Q. Did John Fitsos remain in Nassau during that entire three weeks? A. Yes.

Q. And did you see him and talk to him daily during that time? A. Yes.

Q. Where did you go from Nassau?

A. I came to Los Angeles, and he left someplace else; I imagine for Washington to go see his sister.

Q. Did you come directly from Nassau to Los Angeles without stopping anywhere?

A. He brought me out to Miami, and then put me in the plane for Los Angeles.

Q. And did he come from Nassau to Miami with you? A. Yes.

Q. How long did you remain in Miami before you left for Los Angeles? A. A half an hour.

Q. Were you admitted by the United States Immigration authorities in Miami?

Hearing Officer: Counsel, I think that's been established for the record here. We have the visa and the official record——

Counsel: All I want—I know she was there for more than a half an hour. That's the only thing I am trying to——

Respondent: We went to the Immigration office.

Q. (Counsel to Respondent): Did Mr. Fitsos go with you to the Immigration office?

A. Yes.

Q. And did he accompany you from the Immigration office to your plane? A. Yes.

Q. And did he tell you where he was going?

(Testimony of Respondent.)

A. He was going to his sister's.

Q. Did he say that? A. Yes.

Q. Did he say where his sister was?

A. In Malone, Washington. [90]

Q. And did he tell you whether or not he would later join you in Los Angeles?

A. He said he was going to come and see me immediately in Los Angeles.

Q. And did he say when? A. No.

Q. If John Fitsos had expressed a willingness to participate in a Greek Orthodox ceremony in Los Angeles, would you have done so?

A. Yes, I would have married him.

Counsel: Mr. Hearing Officer, I have here a check dated March 24, 1950, payable to Basio Giannoulia in the sum of $100.00, bearing a signature Theodore Giannos, concerning which I should like to question the witness and have it marked for identification only at this time.

Hearing Officer: Very well, the check is marked for identification purposes then as Exhibit No. 15.

Q. (Counsel to Respondent): Miss Giannoulias, I show you the check I have just identified, and ask you if the signature Basio Giannoulia appearing on the back of that check is your signature?

A. No, it's not my signature.

Q. Does your signature appear anywhere on the back of that check?

A. This is not my signature, and I don't see any signature of mine on the back of the check.

(Testimony of Respondent.)

Q. Did you ever see that check while you were in Nassau, Bahamas?

A. I did see this check, but I never did put my signature on it.

Q. Did you see anybody put your signature on the check?

A. John Fitsos put my signature on it.

Examining Officer: I submit the answer is not responsive.

Counsel: Well, you are correct.

Q. (To Respondent): Did you see anybody put the signature of Basio Giannoulia on the back of the check?

A. I remember seeing him writing on the back of the check, but I didn't know.

Q. Will you answer yes or no, whether you saw anybody sign this name Basio Giannoulia on the back of this check?

A. No, because even if I did I wouldn't know it. I did see John Fitsos write something on the back of it. [91]

Counsel to Examining Officer: You may cross-examine the witness.

Examining Officer: I have no further questions of the respondent.

Counsel: May I then call Mr. Theodore Giannos as a witness on behalf of the respondent.

Q. (Hearing Officer to Counsel): Did you wish to further identify that check, counsel, before you offer it?

A. I am going to develop further evidence from Mr. Giannos.

Hearing Officer: Very well, then, witness is called.

Q. (To Witness): Before you are seated will you raise your right hand and be sworn. Do you solemnly swear that all the testimony you are about to give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God? A. I do.

Q. Will you state your full, correct name?

A. Theodore N. Giannos.

To Counsel: You may proceed, counsel.

TESTIMONY OF THEODORE N. GIANNOS

Q. (Counsel to Witness): Mr. Giannos, I show you Exhibit 15 for identification, and ask you if you have ever seen that check? A. It's my own.

Q. Is the signature Theodore Giannos your signature? A. Yes, it's mine.

Q. And is the other writing on the face of the check your writing?

A. Yes, sir, it's my own handwriting.

Q. And when you wrote this check what did you do with it?

A. When my sister arrived in Bahamas I received a letter that no one was there to receive her, to greet her, and she told me how the weather was, it was very hot and so on, and I knew it was hot, so I immediately sent her a hundred dollars to buy the necessities of clothing.

Q. And how did you send it?

A. In check, in air mail envelope.

(Testimony of Theodore N. Giannos.)

Q. An air mail envelope addressed to whom?

A. Direct to my sister care of Klonaris, this man here, care of that agency, whatever it was. [92]

Q. And was that check ultimately paid by your bank and charged to your account? A. Yes.

Q. Are you familiar with your sister's handwriting? A. I am.

Q. Does the signature Basio Giannoulia appearing on that check appear to be in her handwriting?

A. Well, at that time I didn't know, but now I knew her signature more than I did then, because at that time my sister didn't understand any English at all, and I cannot tell if this is right or not. I asked her and she said she don't remember, and she don't think that she wrote it, endorsed the check.

Q. Now when did you first hear of John Fitsos?

A. In 1949.

Q. And from whom did you hear of him?

A. Through his brother, George Fitsos.

Q. Was George Fitsos employed at the same place where you worked? A. Yes.

Q. Where was that?

A. At the Brown Derby in Hollywood.

Q. And what were your respective jobs?

A. I am supervisor of the liquor department.

Q. And what was his job?

A. He is a waiter.

Q. Now did you have any discussion with George Fitsos concerning John Fitsos and your sister?

A. Yes.

Q. When did that take place?

(Testimony of Theodore N. Giannos.)

A. Along May or June, 1949.

Q. And where did it take place?

A. In the place where we worked and in his house.

Q. Was there anyone else present at that conversation besides yourself and George Fitsos?

A. No, no one.

Q. Will you tell us in effect what you said to him and what he said to you concerning John Fitsos and your sister?

A. In May I believe I gave my notice of leave of absence at the Brown Derby and I told them I was going to the old country, and everybody knew it, of [93] course, all the employees, and George Fitsos said that his brother was going over there also, and I know his brother, and I say "When and where is he?" so he told me he was in New York, not doing anything, and he's back there, and I said "What is he going over there for?" and he says "He's going to get married," so I said to him that I am going over there, and I have sisters, maybe we will get together and let him see my sisters, too, maybe that way he will marry one of my sisters, as long as he is going over there, and we make the trip together, so that suited him very well, and he says to me, "Well, how can we do that," so I said "I haven't got a picture of my sister except an old one," and I was interested in that because he told me that his brother intended to come to Los Angeles and live here, so I wrote to the old country to my sister to send me one of her

(Testimony of Theodore N. Giannos.)

pictures, without letting her know what I wanted it for, and I gave that picture to George Fitsos. George Fitsos sent that picture to his brother, and his brother answered back to George Fitsos and to me at the same time that he likes we get together and talk things over, as long as he is going over there.

Q. So then what did you do?

A. So I wrote him a letter and I said a certain day I will be in New York, I'm leaving, and I like to talk things over, a certain day I will be in New York at a certain place, and we can talk things over there, and then we got together that way, around September the 6th, I believe, 1949.

Q. Where?

A. In New York, in my sister-in-laws' house.

Q. And did you have a conversation then with John Fitsos?

A. Yes, I had a conversation.

Q. What did each of you say?

A. He said that he is not going over there because I am going, and the picture suits him well, and we will fix up and see what we will do, so I said to him "I cannot promise you anything until I go over there, and then I write to you about it," but I said "This picture is my sister, but what they think, if she still wants to come to this country, or maybe meantime she's married, I don't know, and I will write you a letter on what they think, I will explain the whole thing."

Q. Is that the substance of your conversation

(Testimony of Theodore N. Giannos.)

then with him on that occasion? A. Yes.

Q. Then did you go to Greece?

A. I left from there September 8th, 1949, and he stayed in New York, in Malone, New York, I believe.

Q. And when you arrived in Greece did you talk to your sister about John Fitsos?

A. Yes, I had his picture, and I talked with my mother and my sister, and the rest of the family in regards to what conversation took place with John Fitsos. [94]

Q. And did you show your sister John Fitsos's picture? A. Yes.

Q. And what did she say relative to the marriage?

A. She said to write him back and they agreed to get together and marry.

Q. And then did you return to the United States?

A. Not right then, but he sent me the papers, we agreed and he sent the papers through Canada, through the Canadian Embassy, for my sister to come through there because he had arrangements made to get married in Montreal.

Q. Did he tell you that?

A. Yes, in a letter, and my sister and everybody in the house agreed to that, to Montreal.

Q. Had you started any arrangements for your sister to go to Canada before Mr. Fitsos wrote you on that subject? A. No, sir.

Q. And he sent you papers, did he, to take to

(Testimony of Theodore N. Giannos.)

the Canadian Embassy in Greece? A. Yes.

Q. Did you do so?

A. The papers all went to the Canadian Embassy, did not come to me, only the letters came to me, that the papers are in aline with the Canadian Government; when I got the letters I appear in the Canadian Government myself, in the Embassy, in Athens.

Q. And what did you do there?

A. Well, I inquired about it and I found the papers, and I was leaving at that time, because my time was up, and I asked the Consul there if my sister could leave with me as far as Gander, Newfoundland, and there she could proceed to Montreal, and I come to New York, pick him, and go to Montreal.

Q. And what did you learn?

A. The Canadian Government told me that the papers had not arrived yet and he don't know how long it will take place.

Q. Well, then, did you have any further dealings with the Canadian Government?

A. No, I left them, I came to the United States.

Q. Did you go to New York? A. Yes.

Q. Did you talk to John Fitsos there?

A. Yes. I sent him a cablegram from Greece that a certain day I will be in New York, again.

Q. And did you meet him then?

A. Yes. In my sister-in-law's house. [95]

Q. And did you have a conversation with him on that occasion? A. Yes.

(Testimony of Theodore N. Giannos.)

Q. And what did he say and what did you say on that occasion?

A. He told me as long as I could not bring her through Canada he would like some other source, some other way, and I say "I don't know what you can do."

Q. All right, what else was said, if anything?

A. I left then, I only stayed three days in New York; when he went to Malone, I came to Los Angeles.

Q. When did you next, if at all, hear from either John Fitsos or your sister?

A. A week later, a few days later, I had a letter from John Fitsos and he told me that there is an agency in Bahamas that you can bring Basio in, that's—pardon me, my sister, and I said "Well, I don't know."

Q. Had you ever had any dealings with the agent in Bahamas? A. No.

Q. Did you communicate with that agent in any way?

A. Only once. I wrote a letter to that and say "Take care of my sister until this man comes," you know, because he was delayed and I was worrying about it.

Q. Did you have anything to do with the negotiations with the agent for your sister to enter Bahamas? A. Not at all.

Q. Now after you had heard from Mr. Fitsos that he was going to make arrangements with the

(Testimony of Theodore N. Giannos.)

agent in Bahamas, did you hear anything further from your sister?

A. Yes, my sister wrote me—sent me a cablegram from Athens that a certain day was leaving for Bahamas, that everything was right, and they had corresponded, and she agreed to come to this country and leaving a certain for Bahamas.

Q. Now until you received that advice from your sister had you had any discussion with John Fitsos as to where your sister and Fitsos were to be married? A. Yes.

Q. When did you have that discussion?

A. Before—even before I went to leave for Greece.

Q. Now you say you had a conversation with John Fitsos in New York before you left for Greece concerning the marriage of your sister and where it was to take place?

A. In here in Los Angeles, to take place—while I was speaking to his brother George, but when he got the papers out and sent them to Canada the agreement was to get married in Montreal. [96]

Q. And then did you ever have any other conversation with him at a later date as to where the marriage would take place?

A. When my sister arrived in Bahamas and they talk things over he wrote me a letter and he says "We agreed, and we are going to meet in Los Angeles to have the ceremony in Los Angeles."

Q. All right, and is that the first time that you

(Testimony of Theodore N. Giannos.)

had had any correspondence or conversation with Fitsos about a marriage in Los Angeles?

A. No, many times in his—with his brother and his sister-in-law.

Q. Were those conversations before or after she came to Nassau?

A. No, after he came to Los Angeles we had with his brother and sister-in-law.

Q. No, but I mean did you have any conversations at all with him before your sister came to Nassau about her getting married in Los Angeles, or did all of those conversations——

A. Only in correspondence.

Q. Now when your sister was in Nassau did you talk to either she or Fitsos on the telephone or did you confine your communications to mail?

A. In Los Angeles?

Q. When they were in Nassau and you were in Los Angeles? A. Only by mail.

Q. Now when your sister arrived in Los Angeles did she come to your home? A. Yes.

Q. Where were you then living?

A. 813 South Mariposa.

Q. Did you hear from John Fitsos at any time after your sister came to live at your house in Los Angeles? A. I had one letter, that is all.

Q. Where did that letter come from?

A. It came from Malone, New York.

Q. And what, if anything, did he tell you about your sister and himself?

A. He said that "I hope your sister arrived

(Testimony of Theodore N. Giannos.)

safely in Los Angeles and I will be there on my first opportunity."

Q. Now did you have any discussions with George Fitsos concerning any proposed marriage ceremony after your sister arrived in Los Angeles but before Fitsos came here? A. Yes, we had.

Q. Where did those discussions take place?

A. I went into his house, and the place where we worked, because we worked eight hours and we had conversations constantly. I asked him if I can make [97] arrangements with the Greek Community Church and says "Wait until John comes," you know, his brother.

Q. That was after your sister had arrived but before John arrived? A. Yes.

Q. Now after John arrived did you hear from him either in person or by telephone?

A. John arrived on April 27, and I was working, I think nighttime, and he called my house.

Q. Did you talk to him?

A. No, my wife called me at the place where I worked. I asked her where he stopped, and they told me the Rossyln Hotel, and I called him up, but he was out, he wasn't there, I could not get a hold of him that night, but I left the message and I got a hold of him early in the morning.

Q. Did you call him or did he call you early in the morning?

A. I called him. I called in person, and picked him up.

Q. And did you have a conversation with him

(Testimony of Theodore N. Giannos.)

on that occasion about your sister's marriage?

A. Yes.

Q. Will you tell us what each of you said?

A. I went to the hotel I think around 9:30 or 10:00 o'clock in the morning and picked him up and took him over to my sister and my wife, and after they talked a while he said to me he has to go and shave, you know, and get his things together. I took him down to the hotel again after that, and I said "I'll be through at two o'clock in the afternoon. What shall I do, shall I pick you up?" "No," he says, "I'm going to my brother's," and he did, he went to his brother's in North Hollywood.

Q. Now while he was at your house during the time you first picked him up and the time he went back to shave did he and your sister in your presence have any conversation about a marriage?

A. This wasn't in the house at all. My sister and my wife had arrangements to go to a school Cambria School, and we got there about 11:00 o'clock in the morning.

Q. In the car?

A. No, in the school. I picked up Fitsos and we went to school and met his wife and my wife.

Q. And while you were at the school was there any conversation between John and your sister about marriage?

A. Yes—not then I don't think for marriage, but——

Q. Well, that's what I mean. A. No. [98]

Q. No conversation about marriage?

(Testimony of Theodore N. Giannos.)

A. No.

Q. Now after he had told you that he was going to his brother's when did you next see him or hear from him?

A. I called him the next day and made arrangements to go and pick him up and go out for a dinner on a Sunday, that was two days later, I believe it was.

Q. All right. Did you go? A. Yes.

Q. Where did you pick him up?

A. I picked him in his brother's house.

Q. Was your sister with you?

A. Yes, and my wife.

Q. Had he telephoned to you or to your knowledge had he telephoned your sister between the last time you had seen him and that Sunday?

A. Well, I understand that—he told me he called, but I never was present in the house when he called.

Q. And when you saw him on that Sunday, in addition to your wife and yourself and your sister and Fitsos was anyone else present? A. Yes.

Q. Who else?

A. Mr. George Fitsos, his wife, and John, George's son.

Q. And was there any conversation concerning the marriage between John and your sister?

A. Yes.

Q. Now will you tell us as nearly as you can recall what each party said about a marriage?

A. That Sunday I went to pick up George and we spent all day with him. We went to a restaurant

(Testimony of Theodore N. Giannos.)

and ate, and that's all we talked about, just for the arrangements, and he seemed to be indifferent, he didn't want to name a certain day. I didn't know whether he wanted to stay here or going back. He didn't know, he was so uncertain.

Q. Is that what he said?

A. It seemed to me, so he said "I'm with George now, we will talk it over with George," his brother, so about 9:00 o'clock in the evening, Sunday, his brother came from work, and we sat there and had coffee and cake and something like that in his house, and we talked about what we are going to do, then we put it off to the next day to talk things over, so it was pretty late and we left that Sunday, and I made arrangements for him to come over and pick up my sister, take her for a walk or go to a show, go someplace, [99] you know, and he didn't never come.

Q. When did you next talk to him or see him?

A. Two days later after Sunday I sent—it was his brother. I write him a letter that I want to see him in a certain place, to pick him up, and come over and pick my sister, because she was worried about why didn't he come.

Q. And did you meet him then two days later?

A. Yes, he did.

Q. Where did you meet him?

A. At the Brown Derby.

Q. And did you have a conversation with him?

A. Yes, I did.

(Testimony of Theodore N. Giannos.)

Q. Tell us what, if anything, was said about a marriage?

A. He told me that he wanted to settle in business or something, and I said to him, "Well, I take you around town and I get you acquainted with people in your line of business, and all that, and we will look around for things. First," I said, "We will make arrangements with the Church." He says "Well, I am not ready yet," because his brother-in-law was in the old country, and they might come out here for the wedding, his sister, and he put it off and put it off, and I says, "Well, why don't you get an apartment, because your brother hasn't got—he lived in a den, a little den there, and I said "Why you live here? These people have no"—John Fitsos lived in a den, not in a regular bedroom, and I made the suggestion that he should get an apartment instead of living with his brother like that.

Q. All right, what else, if anything, was said about the marriage?

A. Every Sunday I was going over there. Besides, every day I talked with his brother, I says "Why does he act like that?" And they put it off, he says "No, I don't want to get married, I want to go back to New York and get married," you know.

Q. What, if anything, did your sister say during these discussions concerning the marriage?

A. My sister called him up two or three times, she told me, and he said that himself, when my sister called him and told him "why can't we go down to

(Testimony of Theodore N. Giannos.)

the church and make arrangements for the wedding?"

Q. When you were present with John Fitsos and your sister on these various Sundays was that at George Fitsos' house?

A. Part of the time, because John Fitsos worked on Sundays, and he came home about 9:00 o'clock at night.

Q. During the times that he was present did you ever hear your sister say that she would not go through a Greek Orthodox ceremony with him?

A. No. [100]

Q. Did you ever hear her ask him to go through a Greek Orthodox ceremony?

A. Yes, she asked him.

Q. On more than one occasion?

A. Practically every time they were together.

Q. Did either you or your sister ever tell John Fitsos that he had to put up $5,000 in your sister's name? A. Never.

Q. Did either of you ever tell him that he had to get her an apartment and an automobile?

A. Never heard.

Q. Did she ever tell him in her presence that there were any conditions attached to going through a ceremony in the Greek Orthodox Church?

A. No.

Q. Did your sister ever say in your presence and in the presence of John Fitsos that she would refuse to live with John Fitsos?

(Testimony of Theodore N. Giannos.)

A. No, they never discussed it. No, I never heard. She never refused.

Q. Now have you told us in substance and effect the conversations that went on between you and John Fitsos from the time he arrived here concerning the marriage with your sister up until she was served with the annulment papers?

A. I just—I was very surprised to hear about those papers, because every day I was expecting to go through with the ceremony.

Q. Had either George or John Fitsos told you that he was going to file an annulment action against your sister? A. No, never.

Q. Were you at home when the papers were served on your sister? A. No.

Q. Did you ever send any money to John Fitsos?

A. I did.

Q. How much did you send him?

A. I gave him $300 in New York, and then I sent him a hundred dollars more maybe a few days later.

Q. Where did you send that to?

A. I sent it to Malone, New York, to his sister's home.

Q. And for what purpose did you send him the money?

A. On the good faith—I was giving that as a dowry, as a present, to help them along and help establish them, because he was going to come to Los Angeles and live here and open a business, and in an honest way and faithfully I—I sent him that

(Testimony of Theodore N. Giannos.)

money as a present for my sister, because I thought the man was all right and I thought they could make a good marriage. [101]

Q. Was the $100 check which is Exhibit 15 any part of the $400 you sent him?

A. No, that is separate.

Q. Was this $100 check supposed to go to him or to your sister? A. To my sister.

Q. Did you ever tell him he could have this $100?

A. No, I did not know—as I explained before, my sister wrote me that it was pretty hot, and I said "This man is not here yet. What is my sister going to do in a foreign country?" and right away I sent her $100.

Q. Now after your sister was served with papers did you have any conversation with John Fitsos about the marriage with your sister? A. Yes.

Q. When and where did that take place?

A. Mostly in his brother's house. I wanted to be amongst his people, amongst his relatives.

Q. And what was said by each of you?

A. They never make a definite answer as to when we will go down to the Church. I did. I asked the priest myself, and I asked the community board, they said "Yes, any time, let us know a few days before," and I was expecting that. The last time I could not locate John Fitsos, and I sent a letter with George, and George came back the next day and I said "What did John say, George?" "Oh," he says, "he's up in San Francisco, Fresno"—I don't know where he was, they would conceal him

(Testimony of Theodore N. Giannos.)

from me, the last ten days or so. They would conceal him. I could not locate the man. And his son, George's son, answered the phone and I left him a message, that I can't ever call him, and I want to locate him. I was constantly trying to locate John Fitsos.

Q. Did you ever locate him or talk to him after your sister was served with the papers?

A. No.

Q. And did you send him any messages requesting that he go through with the marriage with your sister?

A. After I got those papers I call him up and I told his brother George "Why are things like that? I don't understand what happened." So he says, "I don't know," he says to me, his brother George, "I don't know, I don't know." So he left and he went to New York, and I sent a letter.

Q. Who left?

A. Fitsos, John Fitsos. And I sent a letter air mail registered to his name at his sister's care in Malone.

Q. What did you say?

A. I said "Why they want to do that to me, what's happened, why didn't they explain, why didn't they get through with this?" and after I did make arrangements, and everybody in the family knew this thing. And no answer. In fact I sent him two or three letters, and no answer, so I did not know [102] what to do. I took those papers down to Mr. Collins, the Brown Derby attorney, and I

(Testimony of Theodore N. Giannos.)

showed to him, and he tried to locate him. He asked the attorney and they said "We don't know, this man came up" and this and that, so my attorney says to me "Seems like he abandoned your sister," that's what Mr. Collins advised me. I could not locate the man.

Q. So what did you then do?

A. He advised me "Well, the best thing is to free the girl, as long as he's got those papers." I don't know any legal papers. And he advised me the quicker the better, to drop a man like that.

Q. So then did you make any arrangements in connection with your sister going to Nevada?

A. Yes, after I could not locate Fitsos then I talked to George Fitsos, why this and that, and I could get no satisfaction, and registered mail sent to him and no answer, I didn't know what to do, so I made arrangements, you know, to have a divorce.

Q. Now did your sister at any time when you were ever present ever say to you or John Fitsos that she would not go through with the Greek Orthodox ceremony with him? A. No.

Q. And did John Fitsos ever request you to make arrangements for your sister to go through a ceremony with him? A. No.

Q. To your knowledge did he ever request your sister to go through such a ceremony?

A. I did.

Q. Did he ever request—— A. No.

Q. Did he ever tell you that your sister had

(Testimony of Theodore N. Giannos.)

refused to go through with a marriage ceremony with him? A. No.

Counsel: We will offer Exhibit 15 in evidence.

Examining Officer: I object to the introduction of Exhibit 15 in evidence, and ask that all reference to Exhibit 15 be struck from the record, as there has been no foundation laid as to what purpose it serves and any materiality to this proceeding, to whom the endorsements relate, or by whom they were made.

Hearing Officer: The objection is sustained without prejudice to counsel's further—making further showing in this matter.

Counsel: I think I have no further questions from this witness, Mr. Lay. [103]

Hearing Officer: Very well, we will have a ten-minute recess at this time before cross-examination. The time is 3:20 p.m.

(Recess.)

(Hearing is resumed, the time now being 3:31 p.m.)

Your witness, Mr. Lay.

Examining Officer to Witness:

Q. As I understand from your testimony here, you are the brother of the respondent here?

A. Yes.

Q. Where were you born, Mr. Giannos?

A. In Greece.

Q. Of what country are you now a citizen?

A. United States.

(Testimony of Theodore N. Giannos.)

Q. Were you naturalized in the United States?

A. Yes.

Q. Where were you naturalized?

A. In Los Angeles.

Q. When? A. In 1918.

Q. How long has your residence been in the United States? A. Ever since 1911.

Q. During the proceedings here there has been testimony that your sister was an applicant for an immigration visa for some long period of time in Athens, Greece. Were you connected in any way with that application? A. Yes.

Q. In what way?

A. I was the sponsor of the application.

Q. Do you remember when application was first made for the respondent here?

A. Yes, I believe in 1936 or '37.

Q. And you submitted documents to the American Counsul there as sponsor for her?

A. Yes.

Q. Did you from time to time inquire of or receive information from the American Consulate in Greece concerning the status of your sister's application for a visa? A. Yes. [104]

Q. Did he inform you as to whether she would have a considerable wait in order to get a visa number or not?

A. Before the war, yes. He told me she was to wait a few years.

Q. There has been introduced into evidence today as Exhibit No. 14 a communication which con-

(Testimony of Theodore N. Giannos.)

tains an attachment from the American Embassy at Athens, Greece, which contains a quotation from a letter from that office to an attorney here in California concerning the application of the respondent for a visa. Were you ever advised of the information that is contained in that communication concerning that application?

A. This paragraph here?

Q. Yes, the paragraph in quotes in that communication.

A. Not this particular one, but I was informed in a different way.

Q. You mean you were informed that there——

A. I never see that particular—but something similar to that, and the number—never had an idea that 6,000 and something, because her number was 285 they told me.

Q. That was before the war?

A. Before the war.

Q. But you were aware in general after the war when she resubmitted her application that there would be a considerable delay before her number was reached, is that right?

A. Not—not like that. I personally appeared before the Consul in Athens when I was there, and they did not give me a definite—they say "We don't know what's going to happen from day to day, what orders we are going to receive from Washington." That—that's verbally.

Q. Before the conversation you have related with George Fitsos concerning a possible marriage of

(Testimony of Theodore N. Giannos.)

your sister and his brother John, were you aware of the fact that if your sister was married to a United States citizen it would place her in a position to receive a preference in the issuance of a visa?

A. Well, I knew an American citizen could bring his wife into the country, because I have experience from other people.

Q. Prior to this conversation with George Fitsos had you ever contacted any other person in regards to a possible marriage to the respondent here?

A. No one.

Q. To your knowledge did anyone ever contact any person in her behalf in regard to the arrangement of a marriage? A. No.

Q. This is the only time that any attempt was ever made on your part or by anyone that you know of to arrange a marriage?

A. Yes. [105]

Q. Are you married or single?

A. Married.

Q. What is the name of your wife?

A. Ida Giannos.

Q. Is that the person to whom you have referred here as being present during the numerous conversations between you, the respondent here, and John and George Fitsos? A. Yes.

Q. Did your wife ever to your knowledge or at your request contact any person towards making an arrangement for marriage with the respondent here and some other person other than John Fitsos?

A. No.

(Testimony of Theodore N. Giannos.)

Q. Before your sister here, the respondent, left Greece did you correspond with her concerning her coming marriage to John Fitsos? A. Yes.

Q. Did you receive letters from her?

A. Yes.

Q. Did she ever state in any letter that you received from her that her only purpose in coming to the United States was to be here where you were?

A. I didn't get that clearly.

Q. Did she ever make a statement in any letter that you received from her that her only purpose in coming to the United States was to be here in the United States where you were?

A. No, the only purpose was to marry this man that she got acquainted through correspondence, and the one I recommended.

Q. She never made a statement in any letter that she was only arranging to come here because she wanted to be where you were? A. No, no.

Q. When you talked with John Fitsos or his brother George about arranging a marriage between John Fitsos and your sister, was there any discussion as to who would pay the expenses of bringing your sister to the United States or to the Bahamas? A. No.

Q. Did you agree to pay the expenses of bringing her over to the Bahamas for the marriage?

A. No, no. [106]

Q. You have stated in this testimony, I believe, that you gave John Fitsos the $400 divided up on two occasions. Was that money for the purpose of

(Testimony of Theodore N. Giannos.)

paying the expenses of your sister's coming over here? A. No.

Q. You have previously stated that to your knowledge there was an annulment paper served on your sister in behalf of John Fitsos to terminate their marriage. Is that right? A. Yes.

Q. Did you ever see those papers?

A. I did.

Q. And then following the receipt of those annulment papers as I understand you arranged for your sister to secure a divorce in Las Vegas, Nevada, is that right?

A. After the annulment papers, yes.

Q. If the marriage was in the process of being annulled, why did you believe it necessary to let your sister secure a divorce in order to terminate the marriage which was already in the process of being terminated by annulment?

A. Well, it was a—technicalities—I did not know, I took the advice of my attorney.

Q. Your attorney advised you that she should get a divorce?

A. Yes, there was no other way out.

Q. What was the name of that attorney?

A. Mr. Ford Collins——

Q. That's in Los Angeles here? A. Yes.

Counsel: I think it's Victor Ford Collins.

Witness: Yes, Victor Ford Collins.

Q. (Examining Officer to Witness): Did the attorney at that time advise you that an annulment of your sister's marriage to John Fitsos might

(Testimony of Theodore N. Giannos.)

jeopardize her immigration status in the United States? A. No, he did not mention.

Q. Was that advice ever contained in any correspondence that you received or any statement made to you by anyone? A. No. [107]

Q. Did you at the time the divorce proceedings were instituted believe that an annulment would adversely affect your sister's immigration status?

A. I had no idea.

Q. It is noted in the annulment papers which you have stated you saw that it was alleged therein that your sister had refused to go through the marital relationships essential to a real marriage without first being presented with certain monies, properties, and assets of different kinds. To your knowledge had such demands ever been made upon John Fitsos to produce these assets or monies for your sister? A. I never knew anything.

Q. In the conversations that you have had with John and George Fitsos in the home of George Fitsos which you have decribed here is it not a fact that these requirements or demands, whatever you want to call them, were discussed?

A. Discussed about the money?

Q. Yes, about giving your sister $5,000.

A. No, I never heard anything like that. The only discussion was when are they going to get married, and where he wants to settle, and why don't he move. I personally told him "John, you have no room in this place here," and his brother told me "John has no room here" and I said "Why

(Testimony of Theodore N. Giannos.)

don't you get an apartment or something, let's get together." In fact I took him out and showed him a nice place to rent.

Q. Then is it your testimony that these demands were never even mentioned during these conversations? A. Never heard of it.

Q. I believe you testified that up until or just prior to John Fitsos' arrival in Los Angeles you had received correspondence from him in which he had indicated his intention to come here and marry your sister in the Greek Orthodox Church. Is that right? A. Yes.

Q. Do you know of any reason why he didn't go through with those plans as contemplated?

A. I have no idea. When they got married in Nassau I didn't bother about their plans whatever, and when she came here alone I had a wire that she arriving on a certain night, which was a surprise to me. I was working and a telegram came home. My wife called me, and I went to the airport and I saw only my sister, and I ask her "Where is he?" She says he was in Malone, and the whole thing didn't seem right to me, and I immediately wrote him a letter, I say "Why, when are you coming over?" He came over two weeks later, on the 27th of April. [108]

Q. Now as you know it is alleged in the annulment proceedings and in the evidence in this hearing, Mr. John Fitsos has alleged that his reason for not going through with the marriage ceremony was because he would not, and could not, meet the

(Testimony of Theodore N. Giannos.)

financial demands that were made by you and your sister on him to meet certain financial requirements as a prerequisite to the marriage. Do you have any other reason? You say those demands were not made, that there was no such demand. Can you give any other reason or do you have any idea why then he did not go through with the marriage?

A. I have no idea except that his sister told him to come back home. He told me that himself, that he is going to Malone, that's what his sister wanted. For what reason I don't know, I have no idea why he didn't want to go through with it.

Q. You have testified here that at the time you talked to him you understood that he was going to come to Los Angeles to live after the marriage. Is that right? A. Yes.

Q. Well, during the discussion with him and his brother in his brother's home was the subject of where they would live after the marriage discussed, that is, after John arrived here?

A. Yes. One Saturday afternoon his brother—of course his brother George did not work on Saturdays—and they went to Santa Barbara without my knowledge, but he told me that they went to Santa Barbara. I said "That's a fine place to live, you know," I said, "John, that's a wonderful place. Why didn't you come and take your wife?" and he says "Well, we couldn't get all in the car, and I want to see the place by myself." I said "That's a wonderful place, San Diego is a nice place, if you don't like," because he told me Los Angeles is a

(Testimony of Theodore N. Giannos.)

big city, "And San Bernardino, all around nice little towns." I said "Why didn't you take?" I said, "You come and take your wife and go to Santa Barbara I like Santa Barbara." He went with his family together.

Q. Did you ever make any objections to your sister going to Washington or Malone, somewhere away from California to live with John Fitsos?

A. My sister, I told her "Wherever your husband goes, go." It's news to me, but things like that, whether he asked her to go to Washington, I did not know things like that.

Q. Did you ever hear your sister express any sentiments against going to Washington or somewhere from California to live with her husband?

A. No.

Q. Is your wife here today and willing to testify in this proceeding? A. She is not here.

Q. She was, I believe you said, present at a number of these conversations that allegedly took place? A. Yes, she was. [109]

Q. Do you know whether she is willing to testify in this proceeding? A. I presume.

Q. Have you ever mentioned the subject to her, about testifying in this proceeding? A. No.

Examining Officer: I have no further questions of the witness.

Counsel: I have nothing further.

Hearing Officer: Very well, if there is nothing further of the witness, the witness is excused.

Counsel: I have no further testimony at this

(Testimony of Theodore N. Giannos.)

time to offer on behalf of the respondent.

Q. (Hearing Officer to Counsel): Do you have any further documentary evidence, counsel?

A. No, I do not, sir.

Q. (To Examining Officer): Mr. Lay?

A. I have nothing further.

Q. (Hearing Officer to Respondent): If you should be found subject to deportation would you be willing to depart from the United States voluntarily at your own expense in lieu of deportation?

A. If I am to be deported from the United States I will.

Q. May I understand then that if it is found that you are here illegally and you have to leave, that you are willing to go voluntarily and pay your own way? A. Yes.

Q. Now if you are found subject to deportation and ordered deported, what country do you wish to be deported to? A. Greece.

Q. (To Counsel): If there is nothing further to come before the Hearing Officer, my written decision in this case will be prepared, a copy will be served upon counsel, together with a covering letter stating what further action may be taken in the case. Are there any questions?

A. Nothing further. May I retain, pending receipt of the opinion of the [110] Hearing Officer, the transcript?

Q. Yes. A. Fine, thank you.

Hearing Officer: Hearing is closed.

(Respondent at liberty under $1,000 bond.)

I Certify that, to the best of my knowledge and belief, the foregoing record is a true report of everything that was stated during the course of the hearing, including oaths administered, the warnings given to the alien or the witnesses, and the rulings on objections, except statements made off the record.

/s/ ALFRED E. EDGAR, JR.,
Hearing Officer.

I Certify that the foregoing is a true and correct transcript of the recording made of the testimony taken in the above case.

/s/ CARON RHODES,
Stenographer. [111]

EXHIBIT No. 1

United States Department of Justice
Immigration and Naturalization Service
Office of District Director
458 South Spring Street
Los Angeles 13, California

File No. A7-451-818 Date: Dec. 28, 1950.

Miss Basiliki Andre Giannoulias,
813 South Mariposa Ave.,
Los Angeles 5, Calif.

Dear Miss Giannoulias:

Pursuant to warrant of arrest served on you on November 27, 1950, you are advised to appear at 9:00 a.m., on January 4, 1951, in Room 110-E, W. M.

Garland Building, 117 West Ninth Street, Los Angeles, California, for a hearing to enable you to show cause why you should not be deported from the United States in conformity with law.

The hearing under said warrant is being held pursuant to authority contained in and jurisdiction conferred by Sections 19 and 20 of the Act of February 5, 1917, as amended (8 U.S.C. 155, 156). Failure to appear may result in breach of any bond or parole agreement which has been made in your case.

It is asserted that (1) you are an alien, and (2) you last entered the united States on or about April 13, 1950, at Miami, Florida, and that you are now in the United States in violation of the Act of May 14, 1937, in that, at the time of entry, you were not entitled to admission on the preference-quota visa which you presented upon arrival for the reason that such visa was obtained through fraud, in that you contracted a marriage to procure entry to the United States as an immigrant and failed or refused, after entry, to fulfill your promise for such marital agreement.

You are advised that at the hearing you have the right to be represented by counsel of your own choice and at your own expense, or by any other person duly qualified to practice before the Immigration and Naturalization Service. You are further advised that you should bring to the hearing any documents which you desire to have considered in connection with the case. If any of these docu-

ments is in a foreign language, you should bring the original and certified translation thereof.

You are further advised that if you are deported or if you depart under an order of deportation you will not be permitted to enter the United States within one year after the date of your departure. If you desire to enter the United States after one year has elapsed from the date of your deportation or departure under an order of deportation you must obtain permission from the Attorney General to apply for admission into the United States. If you enter the United States at any time after deportation or departure under an order of deportation without receiving permission from the Attorney General, you will be guilty of a felony and upon conviction be liable to imprisonment of not more than two years or a fine of not more than $1,000, or both such fine and imprisonment.

Yours truly,

H. R. LANDON,
District Director;

By GEORGE W. SCALLORN,
Acting Chief,
Hearing Section.

cc: A. E. Edgar, Hearing Officer.

cc: J. H. Busselle, Inv. Sec. [112]

EXHIBIT No. 2

WARRANT
For Arrest of Alien

United States of America
Department of Justice
Los Angeles, Calif.

No. A7-451-818

To: District Enforcement Officer, Los Angeles, California, or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien Basiliki Andre Giannoulias aka Yiannoulias who entered this country at Miami, Florida, on or about the 13th day of April, 1950, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

The Act of May 14, 1937, in that, at the time of entry, she was not entitled to admission on the preference-quota visa which she presented upon arrival for the reason that such visa was obtained through fraud, in that she contracted a marriage to procure entry to the United States as an immigrant and failed or refused, after entry, to fulfill her promise for such marital agreement.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby com-

mand you to take into custody the said alien and grant her a hearing to enable her to show cause why she should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1951."

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 15th day of November, 1950.

/s/ H. R. LANDON,
District Director. [113]

Port of Los Angeles, Calif.

Date Nov. 27, 1950

WARRANT FOR ARREST OF

Basiliki Andre Giannoulias aka Yiannoulias

Served by me at Los Angeles, Calif. on Nov. 27, 1950, at 10 a.m. Alien was then informed as to cause of arrest, the conditions of release as provided therein, advised as to right of counsel and furnished with a copy of this warrant.

/s/ HOWARD L. SIMERAL,
Investigator

EXHIBIT No. 3

United States Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

(Basiliki Andre Giannoulia)

File: A7 451 818

Sworn statement of George P. Fitsos made to Immigrant Inspector James H. Gunther at the United States Immigration and Naturalization Office, Los Angeles, California, on November 2, 1950, in the English language.

Present:

James H. Gunther, Examining Inspector
Athleeen Hittelman, Stenographer
George P. Fitsos, Respondent

Examining Inspector to Respondent:

Q. I am an Immigrant Inspector of the United States Immigration and Naturalization Service, and desire to question you under oath concerning the immigration status of one Basiliki Andre Giannoulia. Any statements which you make must be voluntary, and may be used by the Government as evidence in any deportation or criminal proceeding. Are you willing to make such a statement freely and voluntarily under oath? A. Yes.

Q. Please stand and raise your right hand; do you solemnly swear that the statements you are

Exhibit No. 3—(Continued)

about to make will be the truth, the whole truth and nothing but the truth, so help you God?

A. Yes.

Q. What is your full and correct name?

A. George P. Fitsos.

Q. What is your address?

A. 5554 Carpenter Street, North Hollywood.

Q. What is your occupation? A. Waiter.

Q. Where do you work at the present time?

A. Brown Derby No. 2, North Vine Street, Hollywood, California.

Q. Of what country are you now a citizen?

A. United States of America.

Q. By virtue of what fact are you a citizen of the United States?

A. I was naturalized 1926 or 1927 in Tampa, Florida. [114]

Q. Do you know a person named John Fitsos?

A. Yes; he is my brother.

Q. Are you acquainted with a certain person named Andre Basiliki Giannoulia? A. Yes.

Q. How did you first hear of Basiliki Giannoulia? A. Through her brother, Ted Giannos.

Q. Would you please explain how you heard about Basiliki Giannoulia through Mr. Ted Giannos?

A. Yes; I worked with Ted Giannos, and he told me he had a sister in Greece. He liked to bring her over here; he was thinking of getting some ex-service man from the American army that he can marry sister somehow and bring her over here. Then he

Exhibit No. 3—(Continued)

speaking of my brother John and I say you can meet John on your way to the Old Country, or you can write to him for I am not so close with John; I wouldn't know if want to get married. He wrote to John and they started conversing. For some reason or another when Ted left here going to the Old Country he didn't tell me the day he was going. He was in New York already when I knew he was going, and he met my brother there in New York.

Q. Did Mr. Giannos proceed to Greece, to your knowledge? A. Yes.

Q. And what arrangements were made between Mr. Giannos and your brother John in New York?

A. Well, I knew through what my brother wrote me; Mr. Giannos, he wanted to bring his sister through Canada and they were to meet in Canada and get married and then come over to the United States, but for some reason or another it didn't occur somehow. After John did fill out the necessary papers from Canada and United States Immigration and sent them to the Old Country, it didn't materialize for some reason. Ted Giannos came back alone and he again met my brother in New York and John wanted to go to the Old Country then (to Greece), but Ted didn't want—I don't know how to put that—he made it such a picture of the Old Country that John didn't want to go there, and they going to make arrangements somehow to bring his sister through Nassau, Bahamas.

Q. To your knowledge, was there any reason why

Exhibit No. 3—(Continued)

Ted Giannos persuaded your brother not to go to Greece to see his sister?

A. He probably found out about John more than I knew before—I don't know exactly why—my brother wrote me—that he didn't want John to go over to the Old Country. [115]

Q. To your knowledge, why did the original plan to bring Mr. Giannos' sister into the United States through Canada—why was that plan abandoned?

A. So they marry in Canada and they can come over to the United States—because they will have to get married in Canada in the Greek Orthodox Church also. They had all their plans made to get married in Greek Orthodox Church before they come over here. I don't think that Mr. Ted Giannos wanted his sister to get married in Canada in the Greek Orthodox Church.

Q. To your knowledge, who then was responsible for the abandoning of this plan to bring Ted's sister into the United States through Canada?

A. I really don't know.

Q. What actually happened insofar as the entry of Basiliki Andre Giannoulia into the United States —what actually happened as far as her entry was concerned—how did she come to this country?

A. They got married first at Nassau, Bahamas Islands, but they did not live together as man and wife; then she and John came together to Miami, Fla., and she took a plane to Los Angeles and John followed a little while after that—I can't say just

Exhibit No. 3—(Continued)

when—one or two weeks after. He went first to Malone, New York to see my sister because her husband was going to the Old Country for visit then he come on out here.

Q. How did you obtain your knowledge of what transpired in the East and also insofar as the entry of Ted Giannos' sister into the United States was concerned?

A. I—my knowledge was from my brother's letters to me.

Q. What transpired after John arrived in Los Angeles?

A. He called Ted Giannos' house—that's the address he had—and they told John over the phone not to go near the house where she is, or to say anything to anyone that his sister come through Nassau, or that they were married. To my brother's surprise—he didn't know what to do. Then Ted told—the only way I knew my brother was here—he told me that John was in town. He told me where he was, and I proceeded to call him and he was in a terrible state of mind—crying and angry—he tell me, "I couldn't expect to be receiving her—they tell me not to go near my wife—not to go near the house."

Q. Who was it that told your brother John this over the phone?

A. The girl—I distinctly remember——

Q. Did she give any reason why she did not wish her marriage to your brother John disclosed, and

Exhibit No. 3—(Continued)

also that she had entered the United States by virtue of her marriage to him?

A. I do not know. She just told him not to tell anything about it and not to go near the house—she didn't want people to know. [116]

Q. Then to your knowledge, when did your brother John first actually see his wife after his arrival here in Los Angeles? A. At my house.

Q. When did that meeting take place—what date, to the best of your knowledge?

A. Saturday—I can't say the date—sometime in May, 1950.

Q. Who was present at the time your brother met his wife?

A. At my house—my wife, Ted, his wife, and John.

Q. What was said at this meeting?

A. Well, it was the first speaking, "How do you do," and she said that she want to—she come to this country to be with her brother and nobody else.

Q. Did you actually hear her say that?

A. She first told that to my wife. My wife being an American not able to speak Greek, her brother translated to my wife, and then she told me that, too—that's right, she told me that she come here to be with her brother.

Q. In other words, she repeated that to you?

A. Yes, she repeated that after I came back in the room.

Q. Did Ted Giannos ever indicate to you that he did not wish his sister to be married to your

Exhibit No. 3—(Continued)

brother John for any other reason than to bring her into the United States?

A. Well, Ted Giannos told me that he be like stealing his sister, without him being present at the wedding (with regard to if they had been married in the Greek Orthodox Church at Nassau, Bahamas, rather than at Los Angeles).

Q. Did Ted Giannos and his sister treat her civil marriage to your brother at Nassau, Bahamas, lightly insofar as you were concerned?

A. They took it as a joke; that it wasn't serious; then when I got angry and told them, "be serious about it; your sister, by law in the United States of America, is his wife now," and they just laughed at me—for what I don't know—just dumb, or something. There was a feeling—I want to put it down—that they could break it easily. I was ashamed because I started it—through me they met my brother.

Q. Did either Ted Giannos or his sister mention any conditions of marriage to your brother after their arrival in Los Angeles? A. No.

Q. Do you know of any such conditions of marriage expressed by either Basiliki or her brother Ted?

A. As my brother told me, they want him, John, to give her an account of $5,000.00; and to buy a home or apartment house; and go into business; and to buy her an automobile, and to promise that he will help her family in the Old Country. [117]

Q. Was anyone else present when she stated to

Exhibit No. 3—(Continued)

him these conditions under which she would marry him?

A. Her brother and his wife, and then again she called my brother at my house over the phone and said those conditions again to him, and as she was talking to him he was telling my wife about it—what a terrible conditions they want—why they want him to do so much.

Q. Was there any reason why Basiliki Giannoulia and her brother thought that your family or John was wealthy?

A. Ted observed, while on his trip to the Old Country, that my cousins over there were wealthy and later Ted's wife stated to my wife that we should try to get some of their money. Ted's wife also told my wife two or three times that they wouldn't let her marry unless they get those conditions which I stated before; and it would take $100,000.00 for anyone to meet those conditions, and she said "we—we don't want $100,000.00," and my wife says to meet those requirements a man must have $100,000.00, and she said they didn't want $100,000.00, but she said they wanted buy an apartment house, buy a home, and even they had to go in with him to go into business.

Q. Was Basiliki Ginnoulia willing to accompany your brother to any part of the United States where he wished to reside?

A. No; she told us no; that she was not going to leave Los Angeles; that she wouldn't live any place but Los Angeles.

Exhibit No. 3—(Continued)

Q. Did she give any reason for wanting to remain in Los Angeles, California?

A. To be with her brother.

Q. Do you have any other reason to believe that Basiliki Giannoulia did not come to the United States to be the wife of your brother John, in good faith?

A. Just to come here and be with her brother.

Q. To your knowledge, were any of these conditions of marriage requested of your brother prior to his marriage to Miss Giannoulia? A. No.

Q. In your opinion, would your brother have declined to have brought her to the United States had those conditions been made to him prior to the marriage?

A. Certainly not; he would never——

Q. Do you wish to say anything else at this time? [118]

A. I would like to have you talk to my wife concerning what she knows about the situation; however, she is not well at this time.

Q. Are you willing to sign the stenographer's notebook to indicate your presence here today, Mr. Fitsos? A. Yes.

/s/ GEORGE P. FITSOS,
Signature—(Traced).

Exhibit No. 3—(Continued)

I hereby certify that the foregoing is a true and correct transcript of my stenographic notes, Book No. 01841.

/s/ ATHLEEN HITTELMAN,
Stenographer.

/s/ JAMES H. GUNTHER,
Immigrant Inspector. [119]

EXHIBIT No. 4

United States Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

(Basiliki Andre Giannoulia)

File: A7 451 818

Supplemental sworn statement of George P. Fitsos made to Immigrant Inspector James H. Gunther at the United States Immigration and Naturalization Office, Los Angeles, California, on November 7, 1950, in the English language.

Present:

James H. Gunther, Examining Inspector
Athleen Hittelman, Stenographer
George P. Fitsos, Respondent

Examining Inspector to Respondent:

Q. This is the same advice as before; that I am an Immigrant Inspector of the United States Im-

Exhibit No. 4—(Continued)

migration and Naturalization Service, and desire to question you under oath concerning the immigration status of one Basiliki Andre Giannoulia. Any statements which you make must be voluntary, and may be used by the Government as evidence in any deportation or criminal proceeding. Are you willing to make such a statement freely and voluntarily under oath? A. Yes.

Q. Will you please stand and raise your right hand; do you solemnly swear that the statements you are about to make will be the truth, the whole truth and nothing but the truth, so help you God?

A. Yes, I do.

Q. What is your full, true and correct name?

A. George P. Fitsos.

Q. Are you the same George P. Fitsos who made a sworn statement in this office on November 2, 1950? A. Yes.

Q. Do you recall on how many occasions you met Basiliki Giannoulia? A. Three.

Q. You have already related the first meeting; would you please state the circumstances of the second meeting?

A. Ted Giannos, his wife Ida, John and Basiliki have been out; they have taken John out for the day, and we were sitting in the living room in my house, and I was talking—something—and I noticed when John and Basiliki, they were talking, or repeating what they had said when they been out looking at houses or something—and she said this, "I want security; I want you to get house, apart-

Exhibit No. 4—(Continued)

ment house, to go in a business, and get a home; we [120] have to have a car out here. Your brother has a car, and got a nice home." John says, "Yes, we will do something; we will get something; we have to get, after"; meaning "after the Greek church ceremony take place." She says, "No, I want it now." Then I say, "You no don't forget you are married to John already." She says, "Oh, no! That out there—that's nothing!" Like that—"That's nothing!" Then she says, "I want security; I want to see what you got," repeating, "I want to know what you have got; you've got to put it on the table." At that point my brother got angry and he put whatever money he had in his pocket, which was about $7.00, on the table. He says, "Now, that's all I got; this all the money I have got; you married me for my money, not for me." And she repeatedly say, "I want security." She says, "When you marry me, you marry a smart girl; you don't marry just an ordinary girl like those we seen down there," meaning the girls in Nassau. I answered too, one time about my house; I said, "Don't forget I been married thirty years," and she repeatedly said that she want those things; she want security or release money; she said that to John.

Q. Was anyone else present at this meeting besides the persons you have mentioned?

A. No. My wife was in the kitchen.

Q. Can you state approximately when this meeting took place in your house?

Exhibit No. 4—(Continued)

A. It was the Sunday following the first meeting; the first week that John got here. I think it was in May; either on Mother's Day or the Sunday before Mother's Day.

Q. Did your brother or anyone else accuse Basiliki of marrying John for the purpose of entering the United States? A. Not that I heard of.

Q. When and where did the third meeting take place at which time you saw Basiliki?

A. It was on Sunday, either one or two weeks after the second meeting—I don't just remember.

Q. Where did that take place?

A. In my house.

Q. And what occurred, or transpired, at that last time you saw Basiliki?

A. We all were talking about the same thing, and Ted's wife got up and stuck her feet down that Johnny have to have money and meet their demands before they let the girl marry to anybody, and at that time my wife come and she was in the next room with my boy, and they heard all this noise and so forth, and she said they can act better than that; that we were making too much noise, and for that occasion Ted's wife called my wife the next day to apologize, but only before she was through she told my wife the plans, what [121] John have to have before he can have that girl; that's when my wife told it take one hundred thousand dollars for anyone to fulfill those demands they want, and she said, "We don't want hundred thousand," and

Exhibit No. 4—(Continued)

my wife say someone must have hundred thousand dollars, you want John to do.

Q. To your knowledge, could your brother John have met the demands made upon him by Basiliki before she would consent to a marriage to him in the Greek Orthodox Church?

A. To my knowledge, I don't believe so.

Q. Who was present at the last occasion that Basiliki was in your home?

A. Ted's wife, I, John and Basiliki; my wife in the den when we were in the living room.

Q. Do you have anything else you wish to say at this time?

A. We had argument with Ted; he wanted to wait and have the wedding here in the Greek Church, and the civil wedding down there, Nassau, and I told Ted there was no reason for that; it was only more expenses, and Ted put it, "I have lot of friends here," and that night I went home and thought it and thought, and said to my wife, "I smell a rat, honey, and I feel it is my duty"; just exactly what I said to my wife; "it is my duty because I started this thing, to write to John and tell him about it—either to marry her in both ways or none at all in Nassau," and John wrote me after she got down there, at Nassau, that he told her that they must have some kind of plans when she gets to Los Angeles to marry somebody else, and they just use him to go to Los Angeles, and she says, "No, John, I come here to marry you, and I going to marry you only." Then when John came

Exhibit No. 4—(Continued)

here he telephoned Basiliki at Ted's house, and she told him right out without even using any sweet words at all, not to go near the place to try to see her or tell anyone that they were married in Nassau. I also remember that on the occasion of the second meeting in my house, I asked Ted what is all this secrecy about. My brother is here and I want to tell them my brother is visiting here, and I want to introduce him and take him out, and I can't, and Ted said, "You can tell them your brother is here, but don't tell them he is married to my sister in Nassau, or he was down there with her."

Q. Are you willing to sign the stenographer's notebook to indicate your presence here today?

A. Yes.

/s/ GEORGE P. FITZOS,
(Signature—Traced)

I hereby certify that the foregoing is a true and correct transcript of my stenographic notes, Book No. 1783.

/s/ ATHLEEN HITTELMAN,
Stenographer.

/s/ JAMES H. GUNTHER,
Immigrant Inspector. [122]

EXHIBIT No. 5

United States Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

File: A7 451 818

(Basiliki Andre Ginnoulias)

A record of sworn statement taken at Los Angeles, California, on October 27, 1950, in the Greek language.

Present:

James H. Gunther, Examining Inspector;
Basiliki Giannoulias, Alien;
John Christopoulos, Interpreter (Official).

Examining Inspector to Interpreter:

Q. What is your name and address?

A. My name is John Christopoulos; I live at 836 South Harvard, Los Angeles 5, California.

Q. Of what country are you a citizen?

A. I am a citizen of Palestine.

Q. Are you qualified to interpret in the Greek language?

A. Yes, as Greek is my mother language.

Q. Have you spoken to the respondent, Miss Ginnoulias; do you understand each other?

A. Yes, I did speak to her and we do understand each other.

Q. Please stand and raise your right hand; do you solemnly swear that you will interpret truthfully and correctly all the questions and answers

Exhibit No. 5—(Continued)

given at this hearing, so help you, God?

A. I do.

Q. (Examining Inspector to Alien): I am an Immigration Inspector of the United States Immigration and Naturalization Service, and desire to question you under oath concerning your status under the Immigration laws of the United States. Any statements which you make must be voluntary, and may be used by the government as evidence in any deportation or criminal proceedings; are you willing to make such a statement freely and voluntarily under oath?

A. I do. [123]

Q. Please stand and raise your right hand; do you solemnly swear that the statements you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. When and where were you born?

A. I was born in 1912 at Mazelija, near Calavriea, Greece.

Q. What is your birth date?

A. Sixteenth of July.

Q. Of what country are you now a citizen?

A. I have a Greek passport, and I am a citizen of Greece.

Respondent Presents: Greek passport No. 12204 in the name of Basiliki Andre Giannoulias, bearing likeness of respondent and showing issuance at Athens, Greece, on December 7, 1949; date of expiration is illegible.

Exhibit No. 5—(Continued)

Q. What is your father's name and where was he born?

A. The name of my father is Andreas Giannoulias; born, Mazelija, Calavriea, Greece.

Q. Is your father living at the present time?

A. No, he died.

Q. Of what country was your father a citizen?

A. He was a citizen of Greece.

Q. What is your mother's name and where was she born?

A. My mother's name is Catherine Andrea Giannoulias; born the same place—Mazelija near Calavriea, Greece.

Q. Is your mother living at the present time?

A. My mother is still living.

Q. Of what country is your mother a citizen?

A. She is a citizen of Greece.

Q. Have either of your parents ever become citizens of any other country than Greece?

A. Of no other country have they been citizens except Greece.

Q. Have you ever taken any steps to become a citizen of any other country than Greece?

A. Never.

Q. What is your present marital status?

A. I am a divorcee.

Q. How many times have you been married?

A. The first. [124]

Q. When and where were you married?

A. I got married on or about 25th of March, 1950, at Nassau, Bahamas.

Exhibit No. 5—(Continued)

Q. To whom were you married at that time?

A. My husband's name is John Fitsos.

Q. When and where did you receive a divorce from John Fitsos?

A. I got my divorce about the 15th of September, 1950, at Las Vegas, Nevada.

Q. How many times have you entered the United States? A. The first time.

Q. When and where did you last enter the United States?

A. I last entered the United States at Florida about 15th of March, 1950.

Q. At what Port in Florida did you enter the United States? A. Miami.

Q. In what manner did you enter; by steamship or plane, or how? A. I came in by plane.

Q. Were you in possession of an unexpired immigration visa? A. Yes.

Respondent Presents: Form I-151 bearing her likeness and bearing number A7 451 818, showing that Basiliki Fitsos was admitted to the United States on April 13, 1950, as a quota immigrant under Section 4(a) of the Immigration Act of 1924.

Note: Respondent's passport previously read into the record also indicates on Page 15 that she was admitted with a Section 4(a) Non-quota Immigration Visa No. 182 which was issued at Nassau, Bahamas, on April 11, 1950, such entry having taken place at Miami, Florida, on April 13, 1950.

Q. Have you ever been excluded from the United States? A. No.

Exhibit No. 5—(Continued)

Q. Have you ever been deported from the United States, or were you ever required to depart in lieu of deportation? A. No.

Q. Prior to your departure from Greece for the United States had you made application for an immigration visa in that country?

A. I did apply in 1937 and again in 1947 and have been ever since on the waiting list for a quota.

Q. Where were you on this waiting list; where had you applied for an immigration visa?

A. I applied for an immigration visa in Athens, Greece. [125]

Q. When did you first hear of John Fitsos?

A. The first time I heard about John Fitsos was from my brother when he visited me in Greece about the 8th of September, 1949.

Q. Would you please state that brother's name to whom you refer?

A. The name of my brother is Theodore Giannos.

Q. How does it happen that your brother uses the name of "Giannos," while you use the name of "Giannoulias," or "Yiannoulias"?

A. It is almost identical except for the English way of writing it; that is all.

Q. What did your brother tell you with regard to John Fitsos on the occasion of his visit to Greece?

A. My brother, Theodore Giannos, was working with the brother of John Fitsos out here in Los Angeles, and he offered to introduce me to his brother in Miami, Florida, through pictures.

Exhibit No. 5—(Continued)

Q. Was this introduction through correspondence to John Fitsos through his brother and through your brother then accomplished? A. Yes.

Q. Did you then correspond with John Fitsos?

A. Yes, I did have correspondence with John Fitsos.

Q. And what agreement did you—or understanding, did you have with John Fitsos as to coming to this country?

A. The agreement was that I should come out here in Los Angeles and get married in the Greek Orthodox Church as my brother was living out here.

Q. That is the agreement you had with John Fitsos? Is that correct? A. Yes.

Q. How did you proceed from Greece to the United States?

A. I first landed at the Bahamas; then Miami and after that, Los Angeles.

Q. How soon after your marriage at Nassau, Bahamas, did you secure your immigration visa?

A. It took me fifteen days to secure a visa to enter the United States.

Q. After your marriage at Nassau, Bahamas, to John Fitsos, did you live with him as man and wife?

A. The agreement with John Fitsos was that I should get married to him in order to enter the United States and to repeat my marriage vows in the Greek Orthodox Church here in Los Angeles, but we never lived as man and wife.

Exhibit No. 5—(Continued)

Q. After your marriage in the Bahamas did you sleep in different rooms or did you sleep in the same bed?

A. We were living in different quarters—different rooms.

Q. Was there a Greek Orthodox Church in the Bahamas?

A. There is a Greek Orthodox Church in the Bahamas. [126]

Q. How does it happen that you were not married in that church or in the first available Greek Orthodox Church in the United States?

A. For the simple reason that I wanted to be with my brother and friends out here in Los Angeles.

Q. After your arrival in the United States, you proceeded to Los Angeles, is that correct?

A. Yes.

Q. Where did John Fitsos go after your arrival in the United States at Miami, Florida?

A. My husband, John Fitsos, as soon as we got married, went back to New York to see his sister and get his belongings.

Q. Who paid your expenses from Greece to the Bahamas Islands? A. It was John Fitsos.

Q. To your knowledge, did your brother defray any of your expenses to this country?

A. No, not that I know of.

Q. How soon after your arrival in the United States did your husband, John Fitsos, join you?

Exhibit No. 5—(Continued)

A. He joined me after we were in Los Angeles.

Q. Did you live with John Fitsos in Los Angeles at any time as man and wife? A. No.

Q. Were you married to John Fitsos in Los Angeles in the Greek Orthodox Church as planned?

A. No.

Q. Why was the marriage not carried out as planned?

A. Because John Fitsos has changed his mind ever since we arrived in Los Angeles.

Q. For what reasons did he change his mind as to his marriage to you?

A. I do not know the reason.

Q. Did you live in separate houses or did you live in the same house after John Fitsos arrived in Los Angeles?

A. He lived with his brother and I lived with my brother.

Q. Did you ask John Fitsos as a condition to your marriage to him in the Greek Orthodox Church that he open an account in your name; buy an automobile in your name and purchase an apartment house before you would marry him?

A. No such conditions were ever put by me.

Q. However, you do not know any reason why he did not go through with his marriage to you in the Greek Orthodox Church, is that correct?

A. Yes. [127]

Q. He did not give you any reason why he did not wish to marry you in the Greek Orthodox Church, is that correct? A. He never told me.

Exhibit No. 5—(Continued)

Q. Did John Fitsos want to live with you as man and wife after your marriage to him in Nassau, Bahamas? A. No, he did not.

Q. Then did you, at any time since your marriage to John Fitsos, have sexual intercourse with him?

A. No, because we have this agreement that we should get first married in the Greek Orthodox Church.

Q. Have you ever been arrested by the police for any cause whatsoever, either in the United States or in any other country? A. No.

Q. Where did you live during the six months immediately preceding your entry into the United States?

A. My mailing address is Mazelija, Calavriea, Greece.

Q. What personal possessions do you have in the United States at the present time?

A. I do not have any other possessions but $2,000.00 in the bank.

Q. Are you employed at the present time?

A. No, I do not.

Q. How are you being maintained at the present? A. Well, I live with my brother.

Q. Would you please give your present address?

A. My present address here in Los Angeles is 1813 South Mariposa, Los Angeles 5, California.

Q. After your entry into the United States did you wish to marry John Fitsos in the Greek Orthodox Church and live with him as man and wife?

Exhibit No. 5—(Continued)

A. Yes, I did.

Q. Upon what grounds did you receive your divorce from John Fitsos in Las Vegas, Nevada?

A. John Fitsos knows the reason, because he was the one to apply for the divorce at Las Vegas, Nevada.

Q. Do you mean that John Fitsos was the plaintiff in that divorce suit rather than you?

A. Yes, it was him and not me. [128]

Q. Did you reside in Las Vegas, Nevada at any time during the divorce proceedings?

A. Yes, I did live in Las Vegas for about three (or two) (record not clear) months.

Q. Did John Fitsos, to your knowledge, live in Las Vegas, Nevada, at any time during the divorce proceedings? A. No, I don't.

Q. To your knowledge, did John Fitsos institute annulment proceedings in California?

A. Yes, he did proceed to annulment proceedings.

Q. Do you wish to say anything else at this time?

A. I have nothing else to add but he was the originator of all this divorce proceedings.

Personal Description:

5'4"; weight, 150 lbs.; dark brown hair; hazel eyes; mole between eye and ear.

Exhibit No. 5—(Continued)

I certify the foregoing to be a true and correct transcript of the recording made of the testimony taken in the above case.

/s/ ATHLEEN HITTELMAN,
Stenographer.

/s/ JAMES H. GUNTHER,
Immigrant Inspector. [129]

EXHIBIT No. 7

Giannoulias, Basiliki Andre
Yiannoulias, Basiliki Andre

W 7-16-12 5-4

18 I 21 W 100 21
I 29 W 000

#A7 451 818 USINS Los Angeles, Calif., 12-2-50

A search of the fingerprints on the above individual has failed to disclose prior criminal data.

/s/ J. EDGAR HOOVER,
Director, Federal Bureau of Investigation.

Inv. 11/15. [131]

EXHIBIT No. 8

In the Superior Court of the State of California
in and for the County of Los Angeles

No. D-398670

JOHN PETROS FITSOS,

Plaintiff,

vs.

BASILIKI ANDRE FITSOS, Also Known as BASILIKI ANDRE YANNOULIA, Also Known as BASILIKI ANDRE GRANNOULIA,

Defendant.

COMPLAINT FOR ANNULMENT OF MARRIAGE

Plaintiff complains of defendant and alleges:

I.

Defendant is a resident of the County of Los Angeles, State of California.

II.

Plaintiff and defendant intermarried on the 27th day of March, 1950, at Nassau, Bahamas, and ever since have been and now are husband and wife.

III.

Plaintiff alleges the following facts as required by §426a of the Code of Civil Procedure of the State of California:

Exhibit No. 8—(Continued)

(a) Plaintiff and defendant intermarried on the 27th day of March, 1950;

(b) The place of marriage was Nassau, Bahamas;

(c) The parties never lived together as husband and wife and the date of separation is therefore the 27th day of March, 1950, the date of marriage;

(d) No time elapsed between the date of marriage and the date of separation;

(e) There are no issue of said marriage.

IV.

For the purpose of inducing plaintiff to consent to said marriage, prior to said marriage the defendant falsely and fraudulently represented to plaintiff that she would live with him as wife wherever he might live, that she would perform the duties of a wife and that she would consummate said marriage by sexual intercourse with the plaintiff and continue to cohabit with plaintiff.

V.

Immediately after said marriage ceremony was completed, defendant stated to plaintiff that she would not live or cohabit with him until their marriage was celebrated by a priest of the Greek Orthodox Church and the parties agreed to come to Los Angeles, California, for that purpose.

Exhibit No. 8—(Continued)

VI.

Defendant arrived in Los Angeles, California, on or about April 14, 1950, and plaintiff arrived in Los Angeles, California, on or about April 26, 1950. Upon plaintiff's arrival in Los Angeles, defendant refused to live and cohabit with plaintiff as husband and wife. Defendant also stated to plaintiff she would not marry plaintiff in the Greek Orthodox Church and would not cohabit and live with plaintiff unless he would first deposit $5,000.00 in a bank in defendant's name, purchase and furnish a home in Los Angeles for defendant, purchase an automobile for defendant and promise to settle in Los Angeles, California. Plaintiff has informed defendant that he is neither willing nor able to fulfill these requirements and demanded that defendant come to live with him as his wife wherever plaintiff might decide to settle. Defendant has refused and continues to refuse to cohabit and live with plaintiff as husband and wife.

VII.

Plaintiff was induced to consent to the said marriage by the said representations of defendant alleged in paragraph IV hereinabove, which he believed at the time of said marriage to be true, and that if said representations had not been made to him, he never would have consented to said marriage.

VIII.

At the time defendant made said representations

Exhibit No. 8—(Continued)

to plaintiff she did not in fact intend to consummate said marriage by sexual intercourse with plaintiff and did not intend to cohabit and live with plaintiff as husband and wife. Said representations were falsely and fraudulently made with the purpose of inducing plaintiff to consent to marry defendant in order that defendant, who is an alien, could obtain permission of the United States to enter this country on the ground that she was married to a citizen of the United States; whereas defendant never intended to cohabit and live with plaintiff as husband and wife once she was successful in reaching this country and said marriage has never been consummated.

IX.

Plaintiff has never cohabited with defendant, either before or after he discovered the falsity of said representations of defendant and the fraud defendant has practiced upon plaintiff.

Wherefore, plaintiff prays judgment that said marriage may be, by decree of this Court, declared to be void for the reasons above set forth, and for plaintiff's costs incurred herein and for such other and further relief as to the Court may seem just and proper.

GANG, KOPP & TYRE.

By /s/ (Indistinguishable.)
Attorneys for Plaintiff. [135]

Exhibit No. 8—(Continued)

State of California,
County of Los Angeles—ss.

John Petros Fitsos, being first duly sworn, deposes and says: that he is the plaintiff in the above-entitled action; that he has read the foregoing Complaint for Annulment of Marriage and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JOHN PETROS FITSOS.

Subscribed and sworn to before me this 17th day of May, 1950.

[Seal] /s/ ANN NILES,
Notary Public in and for the County of Los Angeles, State of California. [136]

Exhibit No. 8—(Continued)

In the Superior Court of the State of California
in and for the County of Los Angeles

No. D-398,670

JOHN PETROS FITSOS,

Plaintiff,

vs.

BASILIKI ANDRES FITSOS, a/k/a BAILIKI ANDRE YANNOULIA, a/k/a ASILIKI ANDRE GRANNOULIA,

Defendant.

ANSWER

Comes Now the defendant and in answer to plaintiff's complaint denies and alleges as follows:

I.

Denies all the allegations of Paragraphs IV, V, VI, VII, VIII and IX of plaintiff's complaint.

Wherefore, defendant prays that plaintiff take nothing by his complaint and that said action be dismissed.

/s/ VICTOR FORD COLLINS,
Attorney for Defendant. [137]

Exhibit No. 8—(Continued)

Affidavit of Service by Mail

State of California,
County of Los Angeles—ss.

E. Olsen, being duly sworn, says, that affiant is a citizen of the United States, over 18 years of age, a resident of Los Angeles County and not a party to the within action.

The affiant's business address is 111 West 7th St., Suite 1111, Los Angeles, Calif.;

That affiant served a copy of the attached Answer, by placing said copy in an envelope addressed to plaintiff's attorneys to wit: Gang Kopp & Tyre, at their office address, which is 401 Taft Bldg., Los Angeles 28, California, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on June 19th, 1950, deposited in the United States Post Office at Los Angeles, Calif. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

/s/ E. OLSEN.

Subscribed and sworn to before me June 19th, 1950.

[Seal] /s/ FRANK J. KANNE, JR.,
Notary Public in and for the County of Los Angeles,
State of California.

Exhibit No. 8—(Continued)

State of California,
County of Los Angeles—ss.

Basiliki Andre Fitsos, being by me first duly sworn, deposes and says: that she is the defendant in the above-entitled action; that she has read the foregoing Answer and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ BASILIKI ANDRE FITSOS.

Subscribed and sworn to before me this 19th day of June, 1950.

[Seal] /s/ FRANK J. KANNE, JR.,
Notary Public in and for Said
County and State. [138]

Exhibit No. 8—(Continued)

In the Superior Court of the State of California, in and for the County of Los Angeles

No. D-398,670

JOHN PETROS FITSOS,

Plaintiff,

vs.

BASILIKI ANDRES FITSOS, a/k/a BASILIKI ANDRE YANNOULIA, a/k/a BASILIKI ANDRE GRANNOULIA,

Defendant.

REQUEST FOR ENTRY OF DISMISSAL

(Without Prejudice)

To the Clerk of Said Court:

You will enter the dismissal of the above-entitled action without prejudice.

Los Angeles, California, September 13, 1950.

GANG, KOPP & TYRE,

By /s/ WILTON A. VERDEN,

Attorneys for Plaintiff.

Dismissal entered this 14th day of Sept., 1950. [139]

EXHIBIT No. 9

Case No. 49887.

Dept. No. 2.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

BASILIKI ANDRE FITSOS,

Plaintiff,

vs.

JOHN PETROS FITSOS,

Defendant.

COMPLAINT FOR DIVORCE

Plaintiff complains of defendant, and for cause of action alleges.

I.

That the plaintiff is and for more than six weeks immediately preceeding the commencement of this action has been an actual, bona fide resident and domiciliary of the State of Nevada, actually, physically and corporeally present and residing and being domiciled therein during all of said period.

II.

That the plaintiff and defendant intermarried at Nassau, Bahamas, on or about the 27th day of March, 1950, and ever since have been and now are husband and wife.

III.

That there are no children the issue of said marriage.

IV.

That there is no community or other jointly owned property belonging to the parties hereto, within the State of Nevada, but that the parties entered into a property settlement agreement on or about the 15th day of June, 1950, fully and finally settling all of their property rights in and to all community and jointly owned property; that said agreement is fair and reasonable to all parties. [140]

V.

That since said marriage the defendant has treated the plaintiff with extreme cruelty and has caused her great grievous mental suffering and pain without cause or provocation, and plaintiff's health was and is thereby and therefrom impaired.

VI.

That the plaintiff's former name was Basiliki Andre Yannoulia.

Wherefore, plaintiff prays judgment:

1. That the bonds of matrimony heretofore and now existing between plaintiff and defendant be dissolved, and that the plaintiff be granted an absolute decree of divorce, and that each of the parties hereto be restored to the status of a single unmarried person;

2. That the property settlement agreement be ratified and approved, made a part of any decree rendered herein, and the parties ordered to comply with the terms thereof.

3. That the plaintiff's former name, Basiliki Andre Yannoulia, be restored to her; and

4. For such other and further relief as the Court deems proper to grant.

SCHULTZ & SCHULTZ,

By CLEVELAND SCHULTZ, JR.

State of Nevada,
County of Clark—ss.

Basiliki Andre Fitsos, being duly sworn, deposes and says: That she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof and that the same is true of her own knowledge, except as to those matters therein alleged on information and belief and as to those matters she believes it to be true.

/s/ BASILIKI ANDRE FITSOS.

Subscribed and sworn to before me this 8th day of September, 1950.

[Seal] /s/ CLEVELAND SCHULTZ, JR.,
Notary Public in and for Said
County and State. [141]

Certification of Copy

State of Nevada,
County of Clark—ss.

I, Helen Scott Reed, the duly elected, qualified and acting Clerk of Clark County, in the State of Nevada, and Ex Officio Clerk of the District Court, do hereby certify that the foregoing is a true, full and correct copy of the original: "Complaint for Divorce" in the action entitled;

BASILIKI ANDRE FITSOS,

Plaintiff,

vs.

JOHN PETROS FITSOS,

Defendant.

Case No. 49987, Dept. 2, now on file and of record in this office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Court at my office, Las Vegas, Nevada, the 15th day of November, A.D. 1950.

[Seal] HELEN SCOTT REED,
Clerk.

/s/ ALDENA MANG,
Deputy Clerk. [142]

EXHIBIT No. 10

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

BASILIKI ANDRE FITSOS,

Plaintiff,

vs.

JOHN PETROS FITSOS,

Defendant.

DECREE OF DIVORCE

The above-entitled cause came on regularly for trial this day before the Court, sitting without a jury, plaintiff appearing in person and by Schultz and Schultz, Attorneys at Law, and the defendant appearing by Attorney William G. Ruymann, and the Court having heard the evidence of witnesses sworn and examined in open court and the cause having been submitted for decision and judgment, and the Court being fully advised finds:

That the Court has complete jurisdiction in the premises both as to the subject matter thereof and as to the parties thereto; that all of the allegations of plaintiff's complaint are true; that the plaintiff is now and for more than six weeks immediately preceding the commencement of this action has been an actual, bona fide resident and domiciliary of the County of Clark, State of Nevada, actually and physically residing and being domiciled therein during all of said period of time; that plaintiff is en-

titled to an absolute decree of divorce on the grounds set forth in the complaint; and that defendant has expressly waived findings of fact, conclusions of law, and written notice of decision in this cause by stipulation in open court;

Wherefore, it is Ordered, Adjudged and Decreed:

That the bonds of matrimony heretofore and now existing between plaintiff and defendant be, and the same are hereby wholly dissolved, and an absolute decree of divorce is hereby granted to plaintiff, and each of the parties hereto is hereby restored to the status of a single, unmarried person.

It is Further Ordered, Adjudged and Decreed, that the Property Settlement Agreement heretofore made and entered into by and between [143] the parties hereto, on the 15th day of June, 1950, be, and the same is hereby ratified, approved, and made a part of this decree, and that the parties hereto be, and they are hereby ordered to comply with the terms and provisions thereof, and that said Property Settlement Agreement shall survive this decree.

It is Further Ordered, Adjudged and Decreed that the plaintiff's former name of Basiliki Andre Yannoulia, be restored to her.

Dated and Done at Las Vegas, Clark County, Nevada, this 8th day of September, 1950.

/s/ A. S. HENDERSON,
District Judge. [144]

EXHIBIT No. 11

Statement made at Washington, D. C., on September 14, 1950, by one John Petros Fitsos.

Present:

John Petros Fitsos, Witness.
Samuel M. Reichman, Acting Immigrant Inspector.

Statement made in the English language.

To the Witness:

Q. You are informed that I am an Acting Immigrant Inspector, United States Immigration and Naturalization Service, and as such am authorized by law to administer oaths and take testimony in connection with the enforcement of the immigration laws. I desire to take a sworn statement from you concerning a complaint you have made concerning your wife Basiliki Andre Fitsos. Your statements are to be voluntary, and you are warned that should it be found you have wilfully testified falsely you may be subject to prosecution for perjury, the penalty for which is imprisonment not to exceed five years or a fine not exceeding $2,000.00, or both such fine and imprisonment. Do you understand, and under these conditions are you willing to make a sworn statement? A. Yes.

Q. Please stand and raise your right hand. Do you solemnly swear that the statements you make at this time will be the truth, the whole truth, and nothing but the truth, So Help You God? A. Yes.

Exhibit No. 11—(Continued)

Q. What is your true and correct name?

A. John Petros Fitsos.

Q. Are you a citizen of the United States?

A. Yes. (Presents C/N No. 6092918, Petition 21294, showing John Petros Fitsos was naturalized in the United States District Court for the District of Columbia at Washington, D. C., November 2, 1948, reverse showing name changed by decree of court from Ioannis Petros Fitsios as part of the naturalization. Certificate returned.)

Q. You have told me you married in Nassau, March 27, 1950, and that you have filed a complaint for annulment of marriage. From what country does your wife come? A. She comes from Greece.

Q. How long had your wife been in Nassau, when you were married?

A. She came over there about March 19, 1950, from Greece.

Q. How did she arrive in Nassau from Greece?

A. She came via BOAC Airlines. [145]

Q. Where did you first meet your wife in person?

A. In Nassau, I believe she arrived there the 24th of March, 1950, leaving Athens the 19th, and I arrived in Nassau on the 24th of March, 1950. I went from Miami to Nassau by boat.

Q. Where in Nassau did you first meet her?

A. At a Greek agents, by the name Klonaris.

Q. Where and on what date in Nassau were you married to Basiliki Andre Fitsos?

A. March 27, 1950, at the City Hall.

Exhibit No. 11—(Continued)

Q. Do you have a marriage certificate?

A. My lawyer has it and I have a copy home. I can bring it if you need it.

Q. Were you ever married prior to that time?

A. No.

Q. How old are you? A. 55.

Q. How old is your wife?

A. She says she was born in 1912. According to that she is about 38.

Q. To your knowledge, was she ever previously married?

A. She said to the United States Consul, she never was married.

Q. When did you return to the United States from Nassau?

A. I believe it was the 14th of April, 1950, at Miami, via BOAC plane from Nassau.

Q. Did your wife come to Miami with you?

A. Yes, on the same plane.

Q. Where did she get her visa?

A. The Agent in Nassau got all my papers and sent to Mr. Nicholson in Washington, then Mr. Nicholson took care of it and a few days later the visa came to the American Embassy in Nassau.

Q. Did you and your wife appear before the American Consul in Nassau?

A. Yes. We went 3 or 4 different times before leaving and paid some fees, and my wife went through some doctor's examinations. We got the visa one afternoon and left Nassau the next day at noon.

Exhibit No. 11—(Continued)

Q. Have you seen your wife since arriving in Miami, about April 14, 1950?

A. Yes. I went to Los Angeles the 27th of April, 1950. I stayed until July 1, 1950. After an argument with me, my lawyer got the papers started. [146]

Q. You were married in Nassau on March 27, 1950, and were there with your wife until April 14, 1950. During that time, did you and your wife live together? A. No.

Q. Where did she stay during that time?

A. We stayed in the same building, an apartment house, across from Klonaris' place, but in separate rooms, sometimes in the same room, but separate beds.

Q. Why did you not stay in the same room with her all the time?

A. Because she said we cannot sleep together until we were married in the Greek Orthodox Church.

Q. During the time you were in Nassau, did you ever have any sexual intercourse with your wife?

A. I never did at all. She wouldn't let me. She said that marriage in Nassau was just an engagement, that we have to go through the Greek Orthodox Church before we sleep together.

Q. Then, at the time when you came to the United States with your wife, you had never engaged in sexual intercourse with her. Is that correct? A. Yes. Nothing except kisses.

Q. Well, what happened when you got to Miami?

A. After we got through with the immigration in

Exhibit No. 11—(Continued)

Miami, I put her on a Delta Airlines plane, changing in Atlanta to American Airlines, for Los Angeles, to her Brother, Ted Giannos, 813 South Mariposa Ave., Los Angeles 5, California.

Q. Why didn't you go to Los Angeles with her?

A. Her brother told me that we didn't have to get married right away, that I could go to Malone, N. Y., to take care of my brother-in-law's business so he and his wife could go to Greece, but my brother-in-law had somebody already, and aften ten days, stay in Malone, I left to go to Los Angeles, to meet my wife.

Q. I understand, then, that the maiden name of your wife is Giannos?

A. No, it was Basiliki Andre Yannoulia. Adds—her brother had told me we could get married in Los Angeles. I told him we could get married in the Greek Orthodox Church in Nassau, and he refused me that, and that is why I believe he was planning to bring his sister to the United States, and now what happened to me, she doesn't want to live with me.

Q. Was there any other reason why you could not be married in the Greek Orthodox Church in Nassau?

A. No. He wanted us to do it in Los Angeles because he had a few people from his home town to be witnesses for his sister's marriage. That was his excuse so he could bring her to the United States, that is all. [147]

Exhibit No. 11—(Continued)

Q. Do you have the paper telling you a visa petition had been approved in behalf of your wife?

A. No. (Several days ago the witness showed notice from the Central Office, dated April 5, 1950, showing petition approved, VP428307, addressed to John Peter Fitsos, c/o Siterios Nicholson, Burlington Hotel, 1120 Vermont Avenue, Washington, D. C. Note: Nicholson is a local Attorney.)

Q. Will you please tell me how you happened to learn about your wife?

A. My brother, George Fitsos, works at the Brown Derby, Captain or Waiter, and her brother works in the same place as bartender. Her brother was bothering my brother for a long time, that he had sister in Greece he would like to bring over. My brother thought both ages matched, and he thought they were good people, so about June of last year, 1949, he went with a picture of his sister to my brother's house, and they sent the picture to me in Washington. Later I corresponded with her brother, and my brother advised me that was good people, and go ahead, bring her over, but the picture they gave me was about ten years younger.

Q. Did you ever correspond with your wife?

A. I wrote about three letters, and she answered. She never asked me then, what she asked face to face in Los Angeles.

Q. In your letters, did you agree to marry her?

A. Yes.

Q. Who was to pay her expenses to come to the United States?

Exhibit No. 11—(Continued)

A. It was 50-50, me and her brother.

Q. And did he pay any part of her expenses?

A. He gave me $500.00. I spent about $700.00 more.

Q. Who paid for her ticket from Greece to Nassau?

A. Her brother sent me $400.00 and another $100.00 and I sent Klonaris in Nassau $563.80, for the ticket from Greece to Nassau for my wife.

Q. Then, did you pay her expenses in Nassau and to the United States?

A. Yes, then I bought her ticket and mine to come to Miami, and a ticket for her to Los Angeles. I bought those tickets in Nassau at the office of the BOAC Airline.

Q. Where does your brother live in Los Angeles?

A. 5554—North Hollywood, 5554 Carpenter Avenue.

Q. When you arrived in Los Angeles about April 27 or 28, 1950, did you and your wife start living together?

A. I went to the Information in Sante Fe Station. I got the number and called her brother's house, as well as he told me before, his house would be my house until we were settled. Her brother's wife was on the phone, and she told me we haven't got any place here, you better go to a hotel. So I asked for my wife, and my wife got on the line, she said, when did you get to town, and I told her I just got in town. She said don't say to any Greek

Exhibit No. 11—(Continued)

we stayed together 3 weeks in Nassau, and I asked why as we are married already, and she said that was no marriage, that wasn't even an engagement, because here we have some bad Greeks, with bad mouths. I said I had nothing to do with them. After a few days she put up the requirement, she acted very different from what she did in Nassau. [148]

Q. What requirements?

A. She said I don't want you to marry in the Greek Church if you do not show me what you have. I have to have $5,000.00, in checking account in her name, an automobile for her, an apartment house for five families, and for me to go in business and then she would marry me in the Greek Church. I asked why she didn't write me all that from Greece and I could give her the answer, now I married you and brought you to the United States and you ask me for all those things. She said she wouldn't marry unless I had the requirements. I told her we were married like everyone else, and she said that was no marriage.

Q. Where did she tell you all this?

A. She came to my brother's house one Sunday night with her brother and his wife, and told me in front of my brother and my brother's wife and my brother's son. Before this, once while riding in her brother's car, she told me the requirements.

Q. Where did you stay in Los Angeles?

A. At my brother's house.

Q. Where did she stay?

A. At her brother's house.

Exhibit No. 11—(Continued)

Q. Did you ever live with her in Los Angeles?

A. No.

Q. Did you ever engage in sexual intercourse with her in Los Angeles?

A. No. Even she wouldn't get close to me in the car.

Q. Have you ever had any sexual intercourse with her any place else in the United States?

A. No. I only saw her in Nassau and in Los Angeles.

Q. Then, as I understand it, you have never had sexual intercourse any place with your wife. Is that correct?

A. Yes. I only saw her twice in Los Angeles.

Q. When did you leave Los Angeles to return to Washington?

A. The first of July, 1950, after my lawyers had the case.

Q. What case have your lawyers?

A. They started suit for annulment. Her brother said he would fight that, and their lawyer said to go to Los Vegas to get a divorce, and she is there now, and I believe she is done. I will know. It was supposed to be a divorce the 8th of September. She put in the papers that it was for mental cruelty, because she wants to stay in the United States, and that is why her lawyer advised that.

Q. Do you have a copy of the Complaint for Annulment? (Yes. Presents copy, Attorneys Gang, Kopp and Tyre, 401 Taft Building, Los Angeles 28,

Exhibit No. 11—(Continued)

California, John Fitsos vs. Basiliki Andre Fitsos a/k/a Basiliki Andre Yannoulia also known as Basiliki Andrew Grannoulia, in the Superior Court of the State of California, in and for the County of Los Angeles. The copy does not show the number or the date. Returned.) [149]

Q. What action do you desire this Service to take concerning your wife?

A. I wish her to be deported because she married me crooked.

Q. Where do you live?

A. 123 Longfellow St., N. W. Washington, D. C.

Q. Where are you employed?

A. I am not working right now. I want to show the Immigration I did not marry her just to bring her here and then divorce her. I married her to have a home, but she asked so many large requirements that it was impossible.

/s/ JOHN PETROS FITSOS.

The foregoing, consisting of six (6) typewritten pages, is a correct record of the testimony in this case, taken directly on the typewriter at Washington, D. C., this 14th day of September, 1950.

/s/ SAMUEL M. REICHMAN,
Acting Immigrant Inspector.

EXHIBIT No. 12

Statement of John Peter Fitsos
in the case of
Basiliki Andre Yannoulia

Taken in the Washington Field Office, Immigration and Naturalization Service January 12, 1951, by Investigator G. G. Podrasky.

Q. I am an acting Immigrant Inspector of the United States Immigration and Naturalization Service and desire to question you, under oath, concerning the purpose of your coming to this office and reporting the conditions of you and the subject. Any statements which you make must be voluntary and may be used by the Government as evidence in any deportation or criminal proceedings. Are you willing to make such a statement freely and voluntarily under oath? A. Yes, sir.

Q. Stand, raise your right hand and be sworn. (Complies.) Do you solemnly swear that all the statements you are about to make will be the truth, the whole truth and nothing but the truth, so help you God? A. Yes, sir.

Q. What is your name?

A. My name John Peter Fitsos.

Q. When and where were you born?

A. Pyrhos, Greece.

Q. Of what country are you a citizen?

A. United States.

Q. What is your race? A. Greek.

Q. Are you married? A. No, sir.

Exhibit No. 12—(Continued)

Q. Were you ever married?

A. Yes, I was married but I am now divorced.

Q. Give the name, nationality and address of your former spouse?

A. Basiliki Andre Yannoulia, Greek nationality and her address is 813 S. Mariposa, Los Angeles, Calif.

Q. Will you state for the record why you are here?

A. Yes, because they blame my brother and my sister-in-law for our separation which that is nothing but lie. Hard feelings begin when she wire me, "Give me $5,000 in cash," in her name to be deposited in a bank, apartment house for five families to be furnished. I have to go in business there in Los Angeles, California. She never will move from Los Angeles with her brother there to go to any city of the United States with her former husband. She also wants an automobile. So I answered, "Why don't you [151] write me from Athens about all these things prior to your coming to the United States?" My answer was, "City of Los Angeles is too large for me. I am a strange person in L. A., California. I be known in Washington, D. C., for the past fifteen years and I have earned my living here and am well acquainted with the conditions in said city; or in the State of North Carolina, preferably Wilmington, as I was in business there during the war—World War II."

She says, "What are you going to do in Washington, put me in the whorehouse in Washington?" I

Exhibit No. 12—(Continued)

even offered to buy a home and business in Santa Barbara, Cal., and she still say she will not leave her brother for any distance of miles. So I said, "Who are you married to, your brother or me?" She made the statement that we were not married. So I said, "We'll find out whether we are married or not. Everybody else in the United States is married in the same way. We don't have to go to the Greek Church to seal the marriage and for all those things you are both lying," my wife and her brother, and they blame my brother and sister-in-law for our separation which are the facts that I have just stated. I have heard from my brother last week, by mail, that my wife had a hearing and that they have blamed my brother and his wife for our separation and final decree of divorce. That is why I am come to this office to clarify the statements of my wife in behalf of my brother and sister-in-law so that they could not be accused by my former wife.

Also, I hear from my brother in his letter that my ex-wife had a chance to marry on Thanksgiving Day some other Greek. That is the second time. They never told the man she was married to me and I am the one who brought her from Greece. They had everything prepared for their wedding and my ex-wife went the day before and spoke to the groom. She said to him, "I want to have $10,000 in my checking account in my name in the bank, Cadillac automobile, apartment house for ten families and then we get married." So the poor guy

Exhibit No. 12—(Continued)

says to her, "Why don't you wait to get married first and we"—like I told her—"buying something." So he pulled out a coin from his pocket and said to her "You take this and take a streetcar and go where you come from," meaning to go home to her brother. All those things a friend of my brother told him; my brother don't know who was the groom but a friend of my brother told him. That is the way I know these things.

I still have respect for the laws of the United States and I think she has no respect which I got for thirteen years and I'd like to see her [152] deported.

(Informant presents a document prepared by the firm of Gang, Kopp and Tyre, 401 Taft Bldg., Los Angeles 28, California, Annulment for Marriage between John Petros Fitsos, Plaintiff, vs. Basiliki Andre Fitsos, also known as Basiliki Andre Yannoulia, also known as Basiliki Andre Grannoulia, Defendant in the annulment proceedings of their marriage.)

Q. Were the proceedings in this annulment ever finished? A. No, we got a divorce.

Q. Why haven't the proceedings of this annulment ever been completed?

A. Because they come up with their lawyer and said they were going to fight the case and I was sick and tired of it all so my lawyer said to let her go to Reno and get the divorce and "You go to Washington and work." And their lawyer said:

Exhibit No. 12—(Continued)

"You have to pay the court costs." I figured the cheapest way for me was to let her go ahead to Nevada and get the divorce.

Q. In this document it is noted that you were married on the 27th day of March, 1950, and the place of marriage was Nassau, Bahamas. The parties never lived together as husband and wife and the date of separation, therefore, is the 27th day of March, 1950, the date of the marriage, and no time elapsed between the date of marriage and the date of separation and that there is no issue of said marriage. Was your marriage ever consumed?

A. She never let me so that's why I went upstairs.

Q. What do you mean about going "upstairs"?

A. I mean I got on my pajamas and took another room. As long as a person won't give it to you, why fight about it. She said, "Respect me until we go to a Greek Church" but they had in mind to take a dowry first in the form of $5,000 and securities.

(Informant presents document, Case #49887, Department #2 in the Eighth Judical District Court, State of Nevada, in and for the County of Clarke, Basiliki Andre Fitsos, Plaintiff, vs. John Petros Fitsos, Defendant. This document is a Decree of Divorce issued at Las Vegas, Clarke County, Nevada on the 8th day of September, 1950, by the District Judge, A. S. Henderson. This copy is verified to be true and correct copy of the original by Helen Scott Reid,

Exhibit No. 12—(Continued)

Clerk, and Joanne Shepp, Deputy Clerk of said Court.)

Q. Are there any further statements you wish to make at this time?

A. That's all I have. No further statements to make. [153]

Q. I wish to thank you for coming in here and making this statement in behalf of the Immigration Service.

/s/ G. G. PODRASKY,
Investigator.

I hereby certify the foregoing pages 1 to 4, inclusive, are a true and correct transcript of my shorthand notes taken during this examination.

/s/ CHARLES H. RYAN,
Stenographer. [154]

EXHIBIT No. 13

Deposition of John Peter Fitsos in the Case of Basiliki Andre Giannoulias Fitsos, File A-7451818 T.

Date: February 4, 1952, 1:45 p.m.

Place: Washington Field office.

Deportation Examiner: E. A. Bloberger.

Examining Officer: Wm. P. Kilmain.

Stenographer: Charles H. Ryan.

Witness: John Peter Fitsos.

Exhibit No. 13—(Continued)

Interpreter: Peter Monocrusos, 811 14th St., Washington.

Counsel for Respondent: Robert T. Reynolds.

Proceedings Conducted Through Greek Interpreter.

Deportation Examiner to Interpreter:

Q. Will you please stand and raise your right hand? (Complies.) Do you solemnly swear that you will, to the best of your ability, interpret from English into Greek and from Greek into English the questions asked and answers given during the course of this proceeding, so help you God? A. I do.

Q. (Deportation Examiner to Examining Officer): What is the nature of the proceeding?

A. This is a deposition requested by the Los Angeles Office, requesting that one John Petros Fitsos be questioned under oath concerning his relationship with his former wife, Basiliki Andre Giannoulias.

Q. (Deportation Examiner to Counsel): Do you represent the defendant in the proceedings now being conducted in Los Angeles?

A. I represent in association with a Los Angeles attorney, Mr. Robert S. Butts.

Q. Are you ready to proceed with the taking of the deposition? A. I'm ready.

Q. (Deportation Examiner to Deponent): Do you speak and understand the English language?

A. Very good.

Q. The services of an interpreter competent in the Greek language are available to you. If you find

Exhibit No. 13—(Continued)

it necessary, please use his services. Do you understand? A. Yes.

Q. Will you please state your full and correct name? A. John Peter Fitsos. [155]

Q. Will you please stand and raise your right hand? (Complies.) Do you solemnly swear that the statements you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God? A. Nothing but the truth.

Deportation Examiner to Examining Officer: Mr. Kilmain, you may proceed with the examination.

Q. (Examining Officer to Deponent): Of what country are you a citizen? A. United States.

Q. Are you married or single?

A. Now I'm married.

Q. Is this your first or second marriage?

A. Second.

Q. What was your first wife's name?

A. Basiliki Andre Giannoulias.

Q. When did you marry her?

A. 27 March of 1950, in Nassau, Bahamas.

Q. I now show you a certified copy of a Marriage Certificate, attached to Visa Petition No. 619311, showing the marriage between one John Petros Fitsos and Basiliki Andre Giannoulias on March 27, 1950, and ask if that refers to your marriage?

A. That is my former wife; yes, sir.

By Counsel: No objection.

Q. (Examining Officer to Deportation Exam-

Exhibit No. 13—(Continued)

iner): I'd like to introduce this Marriage Certificate for the purpose of identification only.

A. The same is received and marked as Exhibit "A."

Q. (Examining Officer to Deponent): I now show you a Question & Answer Statement taken at this office on September 14, 1950, marked Exhibit 11, and ask if that is your signature?

A. (Examines document): Yes, sir; that is mine.

Q. And did you make this statement?

A. (Statement read by Deponent with assistance of interpreter.) Yes, that is correct.

Q. I now show you a Question & Answer Statement dated January 12, 1951, marked Exhibit 12, purportedly given by you, and I ask you to look it over and state whether or not you gave that statement under oath. [156]

A. Yes, sir; I did give that statement under oath.

Q. How did you first become acquainted with your first wife?

A. By picture. Her brother works with my brother and her brother showed a picture, so they sent me the picture; and her brother was going to Greece on September 10, 1949, and he liked to see me in person. I used to work for the Diamond Cab Company and I went to New York City and I meet him.

Q. When did you get the picture?

A. They sent it from California.

Q. What is your brother's name?

Exhibit No. 13—(Continued)

A. George Peter Fitsos.

Q. What was her brother's name?

A. Ted Giannoulias.

Q. Where did your brother and her brother work? A. Brown Derby in North Hollywood.

Q. As I understand, her brother in North Hollywood sent you a picture?

A. He didn't know me; he knew my brother because they worked together and, like friends, he said, "George, I got a sister in Greece. I'd like to bring her over and do you have any brothers?"

Q. Who sent the picture to you?

A. Her brother, Ted.

Q. Did you know Ted Giannoulias prior to that?

A. No.

Q. When you got the picture of this girl were you told at that time that she would be a prospective wife?

A. He said he was going to Greece and "* * * if she wants to come over by plane or boat I'll let you know."

Q. Who said that?

A. He was going to Greece.

Q. Who is "he"?

A. Ted Giannoulias, her brother.

Q. He told you that?

A. Yes, if she wants to come.

Q. Then, I take it you met Ted Giannoulias before he went to Greece?

A. Yes, I meet him in New York City at his sister-in-law's place.

Exhibit No. 13—(Continued)

Q. Did you know his sister-in-law prior to that?

A. I saw her a day or two he was there—at 105 55th Street, New York City.

Q. How did you get to Ted Giannoulias' sister-in-law's house? Did you know her?

A. That was his address he gave to me by mail to meet him there. [157]

Q. You got a letter from Ted to meet him at his sister-in-law's house in New York City and you did meet him? A. Yes.

Q. When you met him there did you discuss marrying his sister with him?

A. Only five minutes at a hotel in New York City. He said, "She's a nice girl and so and so," and that's all.

Q. And did you agree to marry her then on his say-so? A. Yes, sir.

Q. And, up to that time, you had only seen her picture? A. That's all.

Q. Had you received any letters from her?

A. Three letters.

Q. Did you receive these letters after you had received her photograph from Ted Giannoulias?

A. Yes, sir.

Q. Who wrote the first letter, you or her?

A. I did.

Q. And she answered your letter?

A. Yes, sir.

Q. What time of the year was that?

A. That was the beginning of 1950 after her brother come back. He came back 8th of January,

Exhibit No. 13—(Continued)

1950, and he told me, "Well, we can do nothing from Canada," and then he gave me $300 to help me on the expenses.

Q. Her brother came back from Europe and said he could do nothing from Canada?

A. From Montreal.

Q. Then he gave you what?

A. He gave me $300 for the expenses, for the ticket for her.

Q. Where was she coming to?

A. She decided to come to Nassau from Greece.

Q. And when he gave you the $300 what did you do with it?

A. I notified a certain person in Nassau, Bahamas, and he told me the ticket cost $568 and some cents, and right away I paid the rest, the difference. I bought the ticket.

Q. Who was the man you notified in the Bahamas? A. Klonaris Brothers in Nassau.

Q. What did the Klonaris Brothers in Nassau do?

A. They got business like that, bringing brides from Europe to Nassau. [158]

Q. And who told you about the Klonaris Brothers?

A. We saw it in the newspaper, Greek paper.

Q. Then they arranged to bring your first wife to Nassau?

A. That's right, and until she came over she answered back about three or four letters to me of my mail.

Exhibit No. 13—(Continued)

Q. Did she tell you when she was coming?

A. She was notify her brother.

Q. How did you know she was in the Bahamas?

A. Her brother send me a message.

Q. Had she told you she would marry you before she left Greece? A. Yes.

Q. Did you plan on getting married in the Bahamas?

A. Yes, sir. I told her brother I'd get married in the Greek Orthodox Church in the Bahamas.

Q. Do you remember the date she arrived in the Bahamas?

A. It was 19th or 21st, March, 1950.

Q. When did you go to the Bahamas?

A. I got there about twelve hours later by boat from Miami.

Q. Did you meet her in the Bahamas?

A. Yes, sir; in the Klonaris place.

Q. Were you introduced by somebody?

A. By Klonaris and his wife.

Q. Did you decide to get married in the Bahamas at that time?

A. Yes, sir; right away, just a few days later.

Q. Who suggested marriage, you or her?—or, who said to get married?

A. That was the purpose of our meeting there.

Q. Where were you married in the Bahamas?

A. At the City Hall, I believe.

Q. Was this a civil or a church ceremony?

A. He had a black robe.

Exhibit No. 13—(Continued)

Q. Was he a minister or priest of the Greek Church? A. No, sir.

Q. Was he a minister or priest of any church, or was he a civil official?

A. I think he was a priest; maybe he was a Catholic or Presbyterian. He had a black robe, that's all I can say. It was in the City Hall, just main office.

Q. Then, as I understand from your statement, you don't know for sure whether it was a civil marriage by an official of the government or a church marriage by an official of some church? [159]

A. Civil marriage. Mr. Klonaris called it civil marriage.

Q. Did you consider yourself married after this civil marriage?

A. Yes, I was married when I married that way.

Q. Did your wife consider herself married?

A. No. She said that was no marriage; it was not even an engagement.

Q. Why did you go through a civil ceremony rather than a church ceremony if the feeling of your wife was that she was not married?

A. I asked her brother by mail the cheapest way and best way to go through the Greek Orthodox Church so I go through at once, but he wanted it in California.

Q. Did you ask your wife to get married with a church ceremony in the Bahamas?

A. Yes, but she said, "No, we do it in California."

Exhibit No. 13—(Continued)

Q. When did your wife first inform you that she did not consider this civil ceremony as a legal marriage? A. She told me there.

Q. Before you married her?

A. After we was married she told me. In California.

Q. Did she tell you in the Bahamas or in California?

A. In California she tell me about that.

Q. My question was: When did your wife first inform you that she did not consider this civil ceremony as a legal marriage? Was that before the ceremony or after the ceremony? A. After.

Q. Was that while you were still in the Bahamas, or after you left? A. After we left.

Q. How long did you remain in the Bahamas after this civil ceremony?

A. About three weeks.

Q. Where did you reside during that three weeks?

A. At Klonaris Hotel, for people they bring from Europe.

Q. Did you and your wife occupy the same room?

A. I stay one night in the same room, but different bed after she told me she no want to sleep in the same bed until we go through the Greek Orthodox Church.

Q. Did your wife say why she didn't want to sleep in the same bed until after you went through the ceremony in the Greek Orthodox Church?

Exhibit No. 13—(Continued)

A. That's all she said; she wanted to be married by a Greek priest. "Respect me," she said.

Q. And you slept in the same room but in the different bed?

A. One night; and then I went to a different floor. [160]

Q. I think you stated you stayed in the Bahamas approximately three weeks?

A. Yes, sir; from 21 or 20 March to 14th of April.

Q. If your wife stated she did not want to carry on marital relations with you until after you were married in the Greek Church, why didn't you suggest that you get married in the Greek Church in the Bahamas?

A. I did; I suggested to her brother and to her.

Q. Where was her brother?

A. In Los Angeles.

Q. Why didn't you get married in the Greek Church in the Bahamas?

A. She no want to and he no want to. They say, "We have quite a few friends from the old country there," and they like to have the marriage in Greek Church in Los Angeles.

Q. Why did you bother going through a civil ceremony in the Bahamas?

A. For my own way, I was married; but she want to go through Greek Church.

Q. Did you know why she bothered going through such a ceremony if she felt she would not be married? A. I don't know.

Exhibit No. 13—(Continued)

Q. Didn't you both know that she could not get into the United States at that time unless she were married to an American citizen?

A. I guess she be know; I don't know. I guess her brother know all that stuff.

Q. Did you know it?

A. I know she couldn't get into the United States if she's not married to an American citizen; and I know the penalty for me to do anything wrong like that.

Q. Was that the reason you married her at that time * * * so she could get into the United States?

A. I married the girl to have a wife, but I didn't know she was going to ask so much and have so many requirements later.

Q. Did you ask your wife to go through a church ceremony in the Bahamas? A. Yes, sir.

Q. Even though your wife refused to go through with this church ceremony and refused to have marital relations with you, did you remain on a friendly basis with her?

A. Yes, we was friends.

Q. Did you talk over with your wife, before the civil ceremony, the question of whether or not you would live as man and wife after the civil ceremony? A. No, sir.

Q. Did you think, when you went through this civil ceremony, that your wife would immediately start living with you as your wife?

A. Yes, sir; I know it. She's my wife when we get through the marriage. [161]

Exhibit No. 13—(Continued)

Q. You thought she would act like your wife?

A. Yes, that we would sleep together.

Q. The first night after you were married, you stated, you slept in the same room but in different beds? A. Yes, sir.

Q. Did you make any attempt to sleep in the same bed?

A. I did. I took off my clothes and went to bed and she said, "John, I want you to respect me until we go through the Greek Orthodox Church," so I said, "O.K., I'll get out; I'll show you I'm a gentleman."

Q. This happened the first night you were married? A. Yes, sir.

Q. Did you ask her to act as a wife at any other time down there?

A. Just kissed her, that's all.

Q. You didn't ask her to sleep with you any more after the first night? A. No, sir.

Q. You didn't try to convince her in any manner?

A. I told her this is a marriage just like the Greek Church. She said that wasn't even an engagement.

Q. When you left the Bahamas did you leave with your wife? A. Yes, sir.

Q. You left together? A. Yes, sir.

Q. Where did you come to?

A. Miami, Florida, to the Immigration authorities. I paid duty.

Exhibit No. 13—(Continued)

Q. How long did you remain in Miami?

A. About an hour and a half and then she got the airplane. I had the tickets from Nassau and she went to her brother and I went ten days later to California.

Q. Where did she take the airplane to?

A. To Los Angeles, California.

Q. And you went ten days later to Los Angeles, California? A. Yes.

Q. Why didn't you go with your wife?

A. Because I have to go to my brother-in-law's. He was planning to go to Greece and maybe they have someone to put in the store and they had already engaged a person from New York City to go to Malone to work.

Q. So, after that was straightened out, you went to Los Angeles? A. Yes. [162]

Q. When your wife left Miami to go to her brother in Los Angeles were you still friendly with her? A. Still friends same way, yes.

Q. Did you tell her then that you would join her later in Los Angeles? A. Yes, I did.

Q. Did you tell her then that you wanted to go through a church ceremony in Los Angeles?

A. Yes.

Q. And did she agree to it at that time?

A. Yes.

Q. Did she say anything to you * * * put any conditions on this church ceremony? Did she tell you you had to live in any certain place?

A. No, sir.

Exhibit No. 13—(Continued)

Q. When you arrived in Los Angeles, where did you proceed to go?

A. I went to the Information and I go for the telephone number.

Q. Did you go to her house?

A. I go to call on the telephone and she says to me, "Don't say nothing to nobody we married in Nassau, Bahamas. Don't say it to any Greek that we stayed together in the Bahamas because that was no marriage."

Q. Where did you go to live?

A. In a hotel the first night.

Q. Did she come to the hotel to you?

A. No, sir.

Q. You said you stayed in the hotel the first night. Then where did you go?

A. My brother's house.

Q. Did you remain at your brother's house while in Los Angeles? A. Yes, sir.

Q. Did you, at any time while in Los Angeles, ever live in the same house with your wife?

A. No, sir.

Q. Did you ever sleep in the same house?

A. No, sir.

Q. Did she agree to go through a church wedding in Los Angeles?

A. That is what she say, but no certain date. "We got lots of time to get married," they said.

Q. Did she place any conditions on why she would marry you?

Exhibit No. 13—(Continued)

A. She put up the next day when we went for ride. Then she put up the requirements.

Q. What were the requirements?

A. She asked me for $5,000 put in her name, apartment house for five families, [163] buy furnitures and buy an automobile. "Otherwise, I won't marry you through the Greek Orthodox Church if you won't buy those things." I said, "Why don't you write me from Greece all those things and I show you if your foot steps on United States soil."

Q. How long were you separated from your wife from the time you left Miami until you got to Los Angeles? A. About ten days.

Q. Did you go to Los Angeles with the intent of going through a church ceremony?

A. Yes, sir.

Q. Was that the only reason you went to Los Angeles?

A. To get married in the Greek Church.

Q. Did you tell anyone in Los Angeles that you were coming there?

A. No, sir; only when I call up from the Santa Fe Railroad Station.

Q. You didn't send a letter to your wife or her brother that you would be there in ten days?

A. Yes, before I left Malone, New York.

Q. Who did you send the letter to?

A. To Ted Giannoulias, and one to her.

Q. When you first arrived in Los Angeles and you called on the telephone, who did you call for, your wife or Ted Giannoulias?

Exhibit No. 13—(Continued)

A. I called Ted Giannoulias' wife, so she said, "Why don't you send us message before you reach?" so I said the train was going through nights from big cities and I was sleeping. So she said, "Go to a hotel. We haven't got no place for you here." I said, "O.K." So I said, "Put my wife on the telephone," so she put the wife and the wife told me, "Don't say to any Greek here we stayed together in Nassau."

Q. You talked to your wife on the telephone?

A. Yes.

Q. When did you first see your wife after you arrived in Los Angeles?

A. Couple of days later we went for a ride.

Q. Did you talk with your wife over the telephone any time during those couple of days, except the first time? A. Yes.

Q. Did you ask her to marry you again?

A. Not on the telephone. That was when we went for ride.

Q. When you talked to your wife the first night, did you ask her to come to the hotel with you?

A. I haven't talked from the hotel with my wife; I talked from the railroad station.

Q. Did you ask her to come to the hotel with you? A. No. [164]

Q. Did she ask you to come and see her?

A. The only conversation we had was I talked to her brother's wife and then I call for her and then she give me hell and I understood something was coming. She said, "Don't talk to any Greek."

Exhibit No. 13—(Continued)

Then, I never like to talk to her on telephone; I like to see in person.

Q. Did she ask you to come and see her?

A. No, sir.

Q. Did she ask you to take her out?

A. They give me an appointment for a couple of days later.

Q. Your wife? A. No.

Q. Did she tell you not to come and see her?

A. She didn't mention nothing like that. The only thing she said was not to mention living together.

Q. Now, you state your wife asked for certain requirements, or property settlements, to be made before you were married. Just when was this request made of you?

A. When we went out with her brother, his wife, and my wife on some big hill.

Q. That's the time she made this demand on you? A. Yes.

Q. Are you sure you went with her brother and his wife and your wife and you? A. Yes, sir.

Q. Was your brother and his wife there?

A. No, sir; but from there we went to my brother's.

Q. The whole group went to your brother's?

A. Yes, sir.

Q. When you went to your brother's house, I understand you to say that your wife, your wife's brother and his wife, all went to your brother's house? A. Yes, sir.

Exhibit No. 13—(Continued)

Q. Was there a demand made at that time, or any talk of these requirements?

A. The matter was already done outside and we discussed it again when we came back home with my brother.

Q. That was the second time? A. Yes.

Q. Who made these demands of you? Did your wife demand these things?

A. She did. She told me. Now, I don't know who told her.

Q. But she told you? A. Yes.

Q. And she told you in the presence of her brother and his wife; and, later on, in the presence of your brother and his wife? [165]

A. Yes, sir.

Q. What did her brother and his wife have to say regarding these plans? Were they in favor of them or against them?

A. In favor of them, her brother says to me a couple of days later when I meet him outside.

Q. At the time you were talking about it first, did her brother say anything?

A. No, but he was in favor of his sister for me to put up all this money.

Q. What did his wife say * * * her brother's wife, when you talked about it?

A. Nothing in front of me.

Q. When you later on discussed it at your brother's house, did your brother and his wife say anything?

Exhibit No. 13—(Continued)

A. My sister-in-law and my brother said, "They are married." They say to them, "Why don't you ask John?" while my wife was in Athens. "Why don't you write from Athens before you reach the United States? Why don't you ask to him before you come to this country? Why you come here, to rob the man or to marry a good person, a good hardworking man?"

Q. At that time did your wife's brother and his wife say anything?

A. Right there they was in favor for my wife. They agreed they was like it for me to put up check and give $5,000.

Q. Did they say so? A. Yes, they liked it.

Q. How did you know they liked it?

A. I could see what they say to my brother about it.

Q. What did they say?

A. My brother said, "What's the matter? Why didn't you write from Athens?" So her brother come up and said, "She don't have to write from Athens. She can tell it right here; we got plenty of time to get married in Greek Orthodox." And they mentioned getting married in November, 1950.

Q. When your wife made these demands on you, did you have enough property and money to give these things to your wife?

A. I had something but I'm not going to get married the way she wants, in her name, and I didn't know the girl.

Exhibit No. 13—(Continued)

Q. Did you have the $5,000 and the five apartments?

A. I didn't have the apartments; I might have had the $5,000.

Q. Before you got to Los Angeles, had your wife said anything about a property settlement to you?

A. No, sir.

Q. She never told you before you got there?

A. No.

Q. Had her brother said anything to you before you got to Los Angeles?

A. No, but he told me in Los Angeles. [166]

Q. Had anyone said anything to you before you got to Los Angeles?

A. Nothing before I got there.

Q. Did you, when you got to Los Angeles, ever ask your wife to go through a church ceremony there?

A. Yes, I did. I told her to go through as quick as possible because I have to go to work.

Q. Did you put any conditions on her? Did you say she'd have to do anything for you to do that?

A. I told them to make it as soon as possible so I can go to work. I couldn't stay one year. And they said we got lots of time.

Q. You just required that you make it as soon as possible. You didn't tell her she'd have to have any dowry for you? A. No, sir.

Q. Did you ask her to promise you anything?

A. No, sir.

Q. Did she refuse to go through a church cere-

Exhibit No. 13—(Continued)

mony with you unless you furnished these requirements that she asked? A. That's right.

Q. All that time that you were in Los Angeles, did you ever ask your wife to come and live with you as husband and wife? A. I did.

Q. Do you remember where you asked her that?

A. Where?

Q. Was it while you were riding?

A. I asked her on the telephone and I asked her riding in the car.

Q. And she refused to come?

A. She said, "I never will come to live with you except you put the requirements."

Q. Did you ever tell her that she was your wife and that you would like to have sexual relations with her and live as man and wife?

A. Yes, I did.

Q. Did she agree or refuse? A. Refused.

Q. When did you tell her this and where were you?

A. When I was at the railroad station and I was calling her. I said, "Do you want to go out today, tomorrow?" And she said, "I'm not going out." I said, "You know you are married to me and you are my wife?" And she said, "That was no marriage; that was not even an engagement."

Q. Was there any other time this happened?

A. Another time from my brother's house on the telephone. [167]

Q. I now show you Exhibit 8, dismissing without

Exhibit No. 13—(Continued)

prejudice a suit between John Petros Fitsos and Basiliki Andre Petros and ask if that John Petros referred to is you. Are you the person who requested the dismissal of the suit?

A. (Examines Exhibit 8): Yes.

Q. After you married your wife, until such time as you filed suit for annulment, did you really want to live with her as man and wife?

A. Yes, sir.

Q. You were in love with her and wanted to live with her?

A. Yes, but after she put that requirements I lost interests.

Q. Were there any other reasons why you wanted an annulment other than the reasons stated; that she wouldn't live with you?

A. That was the reason, the requirements, and I didn't like that she told me in the United States. And I told her if she wrote me from Athens I wouldn't have gone to all that trouble.

Q. The reason for the annulment was that she wouldn't live with you as man and wife?

A. That's right.

Q. You wouldn't have filed if she would live with you. Is that right? A. That's right.

Q. Why did you decide to meet her in the Bahamas? Why didn't you go to Greece to marry her?

A. That was from the beginning quicker.

Q. You could do it quicker by her coming to the Bahamas and——

A. And I thought it was the best way. That's

Exhibit No. 13—(Continued)

the way her brothed advised, to bring her over to the Bahamas.

Q. Who first suggested that you go to the Bahamas? A. Her brother.

Q. Before that did you agree to meet any other place?

A. She was supposed to come to Montreal.

Q. Whose idea was that? A. It was mine.

Q. Why didn't she come to Montreal?

A. She couldn't meet the immigration requirements.

Q. What immigration requirements couldn't she meet?

A. Her brother, when he was in Athens, went to the Canadian Embassy and said, "I'm an American citizen and I'm leaving in ten days for the United States and I'd like my sister to ride with me on the same plane." The Canadian Embassy got wise and said, "You're from the United States and if your sister goes to Montreal and she's not a citizen of the United States." So they dropped the [168] case.

Q. How much money did her brother give you?

A. $300 first, and $200 later on to help on the expenses.

Q. Is that all the money he gave you?

A. That's right; to help on the expenses.

Q. Did he agree to give you more money later on when his sister came here? A. No.

Q. Was it your full intention when you sent for this girl and had her come to the Bahamas to live

Exhibit No. 13—(Continued)

as man and wife, or was it your idea to get her over here for an annulment?

A. To live with me as my wife but not with the requirements.

Q. Were you ever engaged to any other girl to get married before this? A. No, sir.

Q. Why did you dismiss the annulment suit?

A. On account my lawyer advised me it's going to cost a lot of money; that I was going to pay her lawyer and the courthouse and me.

Q. Did you fight the suit in Las Vegas?

A. I was here and they sent me papers to sign it.

Q. And you agreed to it?

A. I agreed to it.

Q. Did her brother pay you any money at that time? A. No.

Q. Did she pay you any money? A. No.

Q. Did you pay her any money?

A. No, sir.

Q. When was your divorce from your first wife final? A. 9 September, 1950.

Q. When did you marry your second wife?

A. March 4, 1951, in Greece.

Q. Where did you meet your second wife?

A. In little place in Greece.

Q. Did you go over there with the intention of marrying your second wife? A. Yes, sir.

Q. Did you know her before you left the United States? A. No, sir.

Q. How did you know you were going there to marry her, if you didn't know her?

Exhibit No. 13—(Continued)

A. I went by introduction by friend, by a cousin of mine. He knew the family and introduced [169] me.

Q. Where did your cousin live?

A. In Athens.

Q. Did he write and tell you about her before you went over?

A. Not exactly; it was mentioned something, but not clear.

Q. Did you know the girl before you left the United States? A. No, sir.

Q. Did you know her name before you left the United States? A. No.

Q. Had you ever heard of her? A. No.

Q. You have stated that you planned to marry this girl before you went over. How did you plan to marry her if you didn't know her name or hadn't heard of her?

A. I went to marry anybody. When I find somebody like me and I like her. Then I was introduced about five weeks before we got married.

Q. Then you brought your wife back here?

A. I didn't bring her here.

Q. She isn't over here? A. No.

Q. Then you came back to the United States?

A. Yes.

Q. When did you come back?

A. 14 December, 1951, because I was waiting for a visa on account of she was in a family way.

Q. Have you made an application to have your wife come to the United States now?

Exhibit No. 13—(Continued)

A. Yes, since the 10th of March, 1951.

Q. You say your wife is now in a family way?

A. Yes, sir.

Q. How soon do you expect a family?

A. Should be about the 22nd of March.

Q. Examining Officer to Deportation Examiner: At this time, Mr. Examiner, I wish to offer in evidence Question & Answer Statement dated September 14, 1950, marked Exhibit 11, and Question and Answer Statement dated January 12, 1951, marked Exhibit 12.

A. They are received in evidence——

Counsel Interposes: I have some objections to make as to questions contained in them. The answers to some of them were definitely hearsay. [170]

By Examining Officer: I might say I want to introduce them purely for the purpose of identification. I have no objection to you cross-examining the witness on either one.

By Counsel: I want to prevent parts of them from becoming part of the record where they can be observed by anyone who is going to render a decision on this matter because the answers to some questions are entirely hearsay in some cases.

Q. Deportation Examiner to Counsel: They are statements made to an Officer of this Service which he has identified? A. That's correct.

Q. The statements are properly admissible as statements made by the witness which he has identified. The purpose of the deposition is to afford you

Exhibit No. 13—(Continued)

an opportunity to examine the maker of the statements.

A. Also to object to any questions which might have been asked. After all, there wouldn't have been any purpose in having the opportunity to examine them if I couldn't object. I have no objections as far as the identification of the statements is concerned, but I do object to the contents of the answers of certain questions. There's about four questions to which I object to very strenuously. The questions on the two exhibits have been numbered by pencil and I would like to reserve objection to Question No. 28; the answer there is not responsive; and the answer to No. 29 is opinion; and, as to Question No. 110 of the second statement, the answer contains considerable hearsay testimony. That's all as far as objections are concerned.

Q. Exhibits 11 and 12 at the Hearing in the case are made part of the record in this case as Exhibits "B" and "C," respectively, and the objection of Counsel is overruled.

A. Exception, please, in the record.

Q. Exceptions noted.

Mr. Reynolds, have you any questions you wish to ask the witness?

A. Yes, I have; however, I would like to request an adjournment at the present time until Thursday, February 7th.

Q. The examination is adjourned until 10:00 a.m., February 7th.

Exhibit No. 13—(Continued)

(Proceedings adjourned at 3:20 p.m.)

/s/ E. A. BLOBERGER,
Deportation Examiner.

I certify the foregoing pages, 1 to 17, inclusive, to be a true and correct transcript of my shorthand notes.

/s/ CHARLES RYAN. [171]

Deposition of John Peter Fitsos
(Resumed)

Date: February 7, 1952, 10:00 a.m.

Place: Washington Field Office.

Deportation Examiner: E. A. Bloberger.

Examining Officer: Wm. P. Kilmain.

Stenographer: Charles H. Ryan.

Deponent: John Peter Fitsos.

Interpreter: Peter Monocrusos, 811 14th St., Washington.

Counsel for Respondent: Robert T. Reynolds.

Proceedings Conducted Through Greek Interpreter

Deportation Examiner to Interpreter:

Q. Will you please stand and raise your right hand? (Complies.) Do you solemnly swear that you will, to the best of your ability, interpret from English into Greek and from Greek into English

Exhibit No. 13—(Continued)

the questions asked and answers given during the course of this proceeding, so help you God?

A. I do.

Q. (Deportation Examiner to Deponent): Will you please state your full, correct name?

A. John Peter Fitsos.

Q. Are you the same person who appeared for the purpose of making a deposition at this office on February 4, 1952? A. Yes, I am.

Q. Will you please stand and raise your right hand? (Complies.) Do you solemnly swear that the statements you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God? A. Yes.

Deportation Examiner to Counsel: Mr. Reynolds, you may proceed with your examination.

Q. (Counsel to Deponent): Mr. Fitsos, do you have any brothers and sisters in Greece?

A. No, sir.

Q. Do you have any brothers or sisters in the United States other than George in Los Angeles?

A. I got George, and a sister married in Malone, New York.

Q. What is the name of your sister in Malone, New York? A. Mrs. George Smerlis. [172]

Q. Was your sister in New York married in Greece or in the United States?

A. United States.

Q. Are your parents still living?

A. My father died here in about 1934. My mother died in Greece in 1917.

Exhibit No. 13—(Continued)

Q. Your mother and father were married in Greece? A. Yes, sir.

Q. Were they married in the Greek Church?

A. Yes, sir.

Q. Was your sister married in the Greek Church?

A. No, they married by Greek preacher, but not in Greek Church.

Q. In other words, they were married according to the rite, or ritual, of the Greek Orthodox Church? A. Yes.

Q. Did your brother, George, marry a girl of Greek descent?

A. He marry American girl and they married in civil court.

Q. Are you a member of the Greek Orthodox Church, yourself? A. Yes, sir.

Q. Do you consider yourself a member in good standing of that church?

A. Yes, I believe I am. And, for me, was just the same to marry like I was married there.

Q. Let me ask you, according to the beliefs of your church, is it a sin to live in a marital state outside of a marriage by the Church, itself, with a person of the same faith? In other words, according to the doctrines of your church, are persons of the Church, married civilly, living in sin?

A. Same thing.

Q. You haven't answered my question. I asked you if, in your opinion or belief, they are living in sin.

Exhibit No. 13—(Continued)

A. If I was married like a—I married the girl in civil marriage it was just as good as——

Q. Are you married to your present wife according to the rites of the Greek Orthodox Church?

A. Yes, sir.

Q. In your correspondence with your first wife, with your brother, George, and with her brother, Ted, was it not agreed prior to your marriage in the Bahamas that you would again be married in the Greek Church in Los Angeles?

A. Well, I offered to marry there.

Q. I asked you, was it not agreed in advance; yes or no?

A. My brother had nothing to do with it but I offered—— [173]

Q. I asked you if it was agreed in advance, or was it not?

A. I don't know if they had an agreement.

Q. You would know whether you had agreed in advance, wouldn't you?

A. I offered to marry in Bahamas.

Q. Did you, or did you not, agree to marry her in Los Angeles? Did you agree with any one of them; your wife, Ted Giannoulias, or your brother —did you agree with any of them on that before you went to the Bahamas? A. No.

Q. Mr. Fitsos, under oath on September 14, 1950, you made the following statement:

"Her brother had told me we could get married in Los Angeles. I told him we could get married in the Greek Orthodox Church in Nassau and he re-

Exhibit No. 13—(Continued)

fused me that, and that is why I believe he was planning to bring his sister to the United States * * *"—— A. That's true.

Q. I haven't asked you a question yet. Do you recognize that this shows that you had discussed this matter with her brother prior to the marriage in Nassau?

A. I offered him to get married in Nassau the cheapest and quickest way and then he said, because he had some relatives——

Q. Then you did agree that you would marry the girl in Los Angeles prior to the time you were married in Nassau?

A. That was before we got married in Nassau.

Q. And then you had this discussion with the brother? A. You asked me——

Q. Before you went to Nassau, did you agree that you would marry Basiliki Andre Giannoulias in Los Angeles in the Greek Orthodox Church?

A. I didn't give no promise to marry there. When we got in Nassau——

Q. Before you went to Nassau. The answer should be "yes" or "no."

A. Not before; after we got married in civil marriage.

Q. Before you went to Nassau, did you understand that your prospective wife, Basiliki Andre Giannoulias, and her brother, Ted Giannoulias, expected you to marry her in the Greek Church in Los Angeles?

Exhibit No. 13—(Continued)

By Examining Officer: I have to object to that. It's just the same question.

By Counsel: I want to know if he agreed to it. I'm trying to phrase this clearly.

By Examining Officer: All right.

Q. Is the question clear, Mr. Fitsos? [174]

A. I'm trying to say——

Q. If you know the question, answer it. I want a "yes" or "no."

A. I know from Mr. Giannoulias to marry in Nassau and he refused and said in Los Angeles. The answer to the question is no. I didn't know it.

Q. When, exactly did you learn that your wife, your first wife, Basiliki Andre Giannoulias, expected you to marry her in Los Angeles in the Greek Orthodox Church?

A. After I got married in the civil marriage * * * in civil court.

Q. Were you still in the Bahamas when you learned that? A. Yes, in the Bahamas.

Q. You were prepared to marry her in Los Angeles in the Greek Orthodox Church when you left the Bahamas? A. I was ready, yes.

Q. Were you prepared to marry her in that church when you reached Los Angeles?

A. Yes, and they refused me and said, "You got lots of time."

Q. Did you go to any priest of the Greek Orthodox Church to make arrangements for such marriage?

Exhibit No. 13—(Continued)

A. No, because they said we got lots of time and they wanted to do it after September.

Q. Did you make any provision for a residence for your wife in Los Angeles? Did you take an apartment, rent a house, take a hotel room, or——

A. I offered to do it and she said she won't do nothing until I put the money down in her name in the bank and buy apartment house and then she marry me. I offered to rent an apartment and she don't want to live in apartment.

Q. Did you make any effort to visit your wife at her brother's house in Los Angeles during your stay there for three or four months, or whatever was the period you stayed there?

A. She refused to see me. I told her to go out and she refused me and said, "I won't go out until you put the money and the furnitures and the automobile."

Q. Other than serving the process in the annulment suit, did you ever call at her house to see her?

A. I did call.

Q. You called on her at that time?

A. Yes, sir.

Q. On what occasion did you call at the house other than serving the process of the annulment suit?

A. I went once. One time I went there and nobody was in the house; and then I called from my brother's house and then she refused to go out before we get what she wants. [175]

Q. Do I understand that you asked to come to

Exhibit No. 13—(Continued)

see her at her brother's house and that she refused to see you? A. Nobody was there.

Q. I thought I understood that you called her on the phone?

A. I called her on the telephone.

Q. Did she refuse to let you come and see her at her brother's house?

A. And she refused to go out until I put the money to buy the house and I told her to come to Washington, D. C., and I can go in business and rent an apartment out and she said, "What are you going to do with me in Washington, put me in the whorehouse, put me in a bad place?" And I said to her, "I never was in that kind of business in my life. I never expected to hear that kind of a word from you."

Q. You have testified, as I understood from that answer, that she would not go out with you. Now, I ask you again: Did she refuse you permission to come and see her, and did she tell you not to come and see her at her brother's house?

A. No. She said, "I won't go out with you." She refused me.

Q. Now, Mr. Fitsos, on February 4th, in the question made to you by Mr. Kilmain, he said: "Did she tell you not to come and see her?" And you answered: "She didn't mention nothing like that." Now you say she refused to see you——

A. I was calling on the telephone.

Q. Which one of those answers is correct? Did

Exhibit No. 13—(Continued)

she refuse to let you come to see her at her brother's house?

A. He refused to let me come to the house and talk to her.

Q. I understand that your wife made certain demands upon you * * * your wife, Basiliki Andre Giannoulias * * * before she would go through with the ceremony in the Greek Orthodox Church, and that you discussed those demands with her and her brother and his wife the first time. Is that correct?

A. Yes, sir.

Q. And that later the discussion was continued at your brother's house? A. Yes.

Q. In the presence of your brother and his wife, her brother and his wife, your wife, and yourself?

A. Yes.

Q. Did your brother, George, actually participate in these discussions? A. Yes.

Q. Did your brother, George's wife, also participate in these discussions?

A. She can't understand Greek.

Q. I call attention to the question and answer on Page 12 of the interrogatory of February 4, 1952, in which you were asked by Mr. Kilmain:

> "Q. When you later on discussed it at your brother's house, did your brother and his wife say anything? [176]
>
> "A. My sister-in-law and my brother said, 'They are married.' They say to them, 'Why don't you ask John?' while my wife was in

Exhibit No. 13—(Continued)

Athens. 'Why don't you write from Athens before you reach the United States? Why don't you ask to him before you come to this country? Why you come here? To rob the man, or to marry a good person, a good hard-working man?' "

It appears that your sister-in-law did participate in those discussions.

A. My sister-in-law talked with Ted's wife. They are both Americans and don't understand Greek and my brother talked to Ted who understands Greek. That's the way I understood the answer. That's the way it goes.

Q. You have testified that Ted Giannoulias gave you money toward the expense of your trip to meet his sister, or for some purpose?

By Examining Officer: I object to that. He hasn't testified that he gave him money to meet his expenses.

By Counsel: I'll change the question.

Q. You have testified that Ted Giannoulias paid you some money? A. Yes, sir.

Q. What amount did he pay you?

A. He give me $300 first; and then two $100 American Money Order Express; one in Nassau, and one to New York, to help with his sister's ticket to come from Greece.

Q. You are absolutely positive that that is the way it was?

A. Five hundred dollars to help with his sister's

Exhibit No. 13—(Continued)

ticket to bring from Greece.

Q. I will call your attention to answer to a question in a statement under oath on September 14, 1950, page 4, where you were asked:

> "Who paid for her ticket from Greece to Nassau?"

And you responded:

> "Her brother sent me $400 and another $100, and I sent Klonaris in Nassau $563.80 for the ticket from Greece to Nassau for my wife."

Your memory has improved.

By Examining Officer: I object. That's the same.

By Counsel: This time he said $300 before he went; $100 in Nassau; and $100 in Malone.

By Examining Officer: He didn't say how he received it before.

By Counsel: It's quite apparent that he had all this prior to the purchase of the ticket to Nassau. I'm just calling attention to that discrepancy. My purpose is to show [177] that this man's memory isn't so good.

A. I say $300 the way he give it to me.

Examining Officer: You said $500. That agrees.

Deportation Examiner: Objection overruled.

Q. After your marriage to Basiliki Andre Giannoulias at the Bahamas, do I understand that you spent, or remained, one night in the same room with separate beds? A. Yes, sir.

Q. Only one night? A. Yes, sir.

Exhibit No. 13—(Continued)

Q. I draw attention to a series of questions and answers in the Statement under Oath on September 14, 1950, made by the Deponent present. On page 3:

> "Q. You were married in Nassau on March 27, 1950, and were there with your wife until April 14, 1950. During that time did you and your wife live together? A. No.
>
> "Q. Where did she stay during that time?
>
> "A. We stayed in the same building, an apartment house, across from Klonaris' place, but in separate rooms, sometimes in the same room, but separate beds."

What was the name of the town in Greece where you met your second wife * * * your present wife?

A. Kamari.

Q. What was her maiden name?

A. Adamopolous.

Q. How did you come to meet your present wife?

A. Cousin of mine introducing. I'd say less than five weeks before we got married.

Q. Had you ever heard of that girl before that introduction?

A. No, because I'm here thirty-one years in the United States and I didn't meet her before.

Q. Where was your brother-in-law, Smerlis, born? A. Kamari, Greece.

Q. That's the same town that your present wife came from? A. Same town, that's right.

Q. When you went to Malone, New York, after

Exhibit No. 13—(Continued)

leaving Miami, Florida, in 1950, to visit your brother-in-law, Smerlis, was he preparing to make a trip to Greece? A. Yes. [178]

Q. Did he thereafter make a trip to Greece?

A. He went to Greece to visit his mother.

Q. Did he go to the town of Kamari?

A. That's where she lives, his mother; yes.

Q. Had your brother-in-law, Mr. Smerlis, returned to the United States before you, yourself, went to Greece? A. Yes, sir.

Q. Did you see him, or correspond with him, or talk to him on the telephone at any time after his return from Greece and before your journey to Greece?

A. I see him at Malone. I went there on account of immigration in Malone.

Q. At any time did Mr. Smerlis write to you the name of, or mention to you the name of the girl that you are presently married to? A. No sir.

Q. Do you know whether he knew that girl in Kamari?

A. I guess he knew. I don't know; I can't say.

Q. Did you and Mr. Smerlis at any time discuss the possibility of your marrying a girl in Kamari, Greece? A. No, sir; never did.

Q. Did you discuss it with your sister, Mr. Smerlis' wife?

A. No, sir; she never been there. She don't know the place.

Exhibit No. 13—(Continued)

Q. Do you know how long your brother-in-law, Mr. Smerlis, remained in Greece, approximately?

A. How long he stayed in Greece? I believe he stayed around less than thirty days.

Q. Is your cousin in Athens any relation to Mr. Smerlis? A. No, sir.

Q. Is he friendly with Mr. Smerlis?

A. He don't know the person.

Q. Doesn't know him?

A. He went there but the man was busy.

Q. You, yourself, come from Greece, do you not, Mr. Fitsos? A. Yes, sir.

Q. What town did you come from?

A. Pyrgos.

Q. Are they near each other?

A. No, sir; about 200 miles.

Q. Where did you go first when you went to Greece?

A. I get off at Poros (phonetic) and went to Athens. There was a cousin of mine, a lady, she's a widow, and my cousin and his brother, [179] Chris, and the lawyer was down in Poros where the ship—the port.

Q. How soon after you arrived in Athens did you go to Kamari?

A. I'd say about four or five days.

Q. Four or five days? A. Just about.

Q. Do you have any relatives, yourself, in Kamari?

A. No, sir; except my brother-in-law's mother and then I met another brother, Louie, and his wife.

Exhibit No. 13—(Continued)

Q. Do you have any relatives at all in Pyrgos?

A. No, sir.

Q. You didn't go to visit Pyrgos at all?

A. I pass by one time—couple of times or so.

Q. Do you know the circumstances of your cousin's acquaintance with your present wife in Kamari—how she came to know your present wife in Kamari?

A. The man, he sells trucks, cars, tires——

Q. Your cousin?

A. Yes, and he is just like a dealer. He pass through once a month. He knows her there and, you know, it's just small town. I don't know what more I can say.

Q. In your answers to Mr. Kilmain's questions on February 4th, on Page 16, he asked: "Where did your cousin live?"

And you answered, "In Athens."

He asked, "Did he write and tell you about her before you went over?"

Your answer was: "Not exactly. It was mentioned something but not clear."

I'd like to have that made a little more clear, Mr. Fitsos. Did your cousin write to you before you went to Greece? A. Yes.

Q. Did he mention this girl in Kamari?

A. I don't know, personally, if he mentioned. I don't know who it was.

Q. Did he mention your brother-in-law, Mr. Smerlis', visit to him?

A. He mention to me in letter he went to his

Exhibit No. 13—(Continued)

office but he didn't wait and he wants to, like he tole me, he didn't wait for me to take him home for a visit to have a dinner home.

Q. Did your cousin in Greece mention to you that Mr. Smerlis spoke of a girl in Kamari whom you are presently married to?

A. He never did. [180]

Q. Mr. Fitsos, you have testified in several of these interrogations, including the last one, that you received a picture of Basiliki Andre Giannoulias before you went to Nassau to marry her.

A. Yes, I did.

Q. From whom did you receive that picture —who sent it to you? A. Ted Giannoulias.

Q. Do you have that picture?

A. I ain't got it with me; I don't think I got it.

Q. Did the picture reveal to you a fairly nice looking girl?

A. Same thing as the passport; nothing extra.

Q. You mean the picture that you saw of her was taken at the same time that you corresponded with her? A. Yes.

Q. You never testified that it was taken some ten years before?

A. It was the same thing; the same face.

Q. I asked you if you ever testified under oath that the picture was taken some ten years before you saw it.

A. It was three years, I believe; or maybe ten.

Exhibit No. 13—(Continued)

I don't know what it was but was signed same thing as the picture on the passport papers.

Q. I don't doubt that it was a picture of the same woman but what I have in mind is whether you felt—I'll divert for a second to read an answer from Page 4 of the Question and Answer Statement under oath on September 14, 1950, by you.

You were asked: "How did you happen to learn about your wife?"

In part, you answered: "——later I corresponded with her brother and my brother advised me that it was good people and go ahead and bring her over. But the picture they gave me was about ten years younger." A. That was my answer.

Q. In other words, you believe they misled you a little. Is that it?

A. The whole works was from me. I went with good intentions and married her. It was the same; I wasn't complaining for anything. No, I don't think so; I know what I got. Maybe I felt I was fooled. That's what I was say. I was fooled but I still was satisfied and went through with it.

Q. Now, Mr. Fitsos, honestly, the fact that you had been fooled a little bit in regard to the age of your bride, and her later requirements, combined to destroy your love for her. Is that correct?

A. Well, she was the reason. She was the person to be blamed, because I went to Los Angeles with good intentions to be married but, after she put

Exhibit No. 13—(Continued)

up $5,000 and apartment house with five family and automobile and all that, I thought I do her a favor to bring her here from Greece to marry her. And then when she said, "If you don't put all those things [181] down I won't marry you in the Greek Church." That make anybody——

Counsel Interposes: I have no further questions.

Q. (Deportation Examiner to Examining Officer): Did you have any questions, Mr. Kilmain?

A. I think I may have one question.

Q. (Examining Officer to Deponent): When you went to Los Angeles, if your wife, whom you married in a civil marriage, had been agreeable to marrying you in the Greek Orthodox Church without any requirements, as mentioned in previous reports, would you have gone ahead and married her in the Greek Orthodox Church? A. Yes, sir.

Q. Did you want to do that?

A. I want to do that. That's why I went there.

Counsel Interposes: I'd like to ask one more question and get a "yes" or "no" answer.

Q. (Counsel to Deponent): Did you make any arrangements in Los Angeles with any official or priest of the Greek Church to marry Basiliki Andre Giannoulias?

A. No. Now I want you to understand why I say "No." I talk to her brother and to Basiliki. I said, "By gosh, I been suffering with this marriage since September, 1949, when I met your brother to go

Exhibit No. 13—(Continued)

through the Greek Orthodox Church. Now, when we expect to get married?" And she said, "I got lots of time; I'm not in a hurry." I said, "Why you got lots of time?" I got to tend to my business and work. "I'm not in a hurry," she says; and then she put it through to get her American citizen papers.

Q. (Examining Officer to Deponent): She made no definite date with you for a marriage?

A. That's right. The 27th of April I was there, after we got married in Nassau, and they mention September. We got lots of time before.

Q. (Counsel to Deponent): They mentioned September, though?

A. But what date in September? "We don't know. It take us long time to fix the wedding gown."

Q. (Examining Officer to Deponent): Was that only on the condition, that you meet these requirements she put up to you? Was that on condition you furnish the $5,000, the apartment house, the automobile, etc.? [182]

A. She wants that before we set the date; the car, the apartment, the dollars, and then they going to set the date.

Q. (Deportation Examiner to Examining Officer and Counsel): Are there any further questions?

A. (Examining Officer): Not by me.

Q. (Deportation Examiner to Deponent): Did you fully understand the questions that were asked

Exhibit No. 13—(Continued)

you? A. Yes, I did.

Q. Thank you, very much. The proceeding is closed.

(Closed at 11:20 a.m.)

/s/ E. A. BLOBERGER,
Deportation Examiner.

I certify the foregoing pages, 1 to 29, inclusive, to be a true and correct transcript of my shorthand notes taken during this proceeding.

/s/ CHARLES H. RYAN,
Shorthand Reporter. [183]

EXHIBIT No. 14

Standard Form No. 64

Office Memorandum, United States Government

A-7451818(T) Inv.
Date: March 21, 1952.

To: District Director, Los Angeles, California.

From: W. F. Kelly, Assistant Commissioner, Enforcement Division, Central Office.

Subject: Your A-7451818; Baisiliki Andrew Giannoulias aka Basiliki Andrew Fitsos.

There are attached for your information copy of a memorandum from the Department of State, dated

February 5, 1952, and copy of the OMV from the American Embassy at Athens, Greece, dated January 25, 1952, relating to the above-named alien.

/s/ W. F. KELLY.

Attachments. [184]

February 5, 1952

In reply refer to
VD 150 Giannoulia, Vasiliki A.

Attention: Immigration and Naturalization Service.

The Secretary of State refers the Attorney General to a communication, dated October 16, 1951 file A-7451818-T), and its enclosure, from the Immigration and Naturalization Service concerning the case of Vasiliki (Basiliki) Andre Giannoulia (Giannoulias), also known as Basilike Andre Fitsos, who is the subject of deportation proceedings. The letter under reference requested that information be obtained from the American Embassy at Athens with respect to the allegation made by the alien that she had been an applicant for an immigration visa at that office for approximately fourteen years prior to her entry into the United States.

There is enclosed a copy of a communication, dated January 25, 1952, which has been received from the Embassy at Athens furnishing informa-

tion contained in the files of that office with regard to the matter.

Enclosure:

From Embassy, Athens,
OMV-304, January 25, 1952. [185]

For Visa Division

Foreign Service of the United States of America
Operations Memorandum

Security: Unclassified.

To: Department of State.

From: Amembassy, Athens.

Ref: Dept's OMV-231, dated January 10, 1952.

Subject: Visas: Case of Vasiliki A. Giannoulia, also known as Basiliki Andre Fitsos.

Records of this office show that Miss Giannoulia filed a visa application prior to the war. In accordance with Department instructions all pre-war lists were destroyed. Miss Giannoulia did not reapply for an immigration visa until September 10, 1947, at which time her name was re-registered as number 6,483 on the non-preference waiting list.

On November 19, 1948, this office notified Oscar Richard Cummins, Attorney at Law, 9441 Wilshire Blvd., Beverley Hills, California, who was acting on behalf of Mr. Theodore Giannos, Miss Gian-

noulia's brother and sponsor, of the facts. A portion of this letter is quoted:

"I am obliged to inform you that the Greek quota is heavily oversubscribed even in the preference categories, and those applicants having first and second-preference status naturally take precedence over those having non-preference status. In view of the fact that there are more than 6,000 persons registered in Athens alone who are entitled to prior consideration because of their earlier application, it appears likely that Miss Giannoulia may experience a waiting period of indeterminate duration before final action can be taken on her application."

The fact that no regular Greek quota non-preference numbers have been available for use since 1945 and the fact that there are 6,482 applicants registered on the regular quota waiting list in this office alone ahead of Miss Giannoulia should be sufficient rebuttal for her statement that "just prior to her entry into the United States on April 13, 1950, been advised by the American Consulate at Athens, Greece, that such visa would in the very near future be available for her."

Unclassified. [186]

EXHIBIT No. 15

[Check]

16-141 Eighth and Vermont Branch 16-141

Bank of America
National Trust and Savings Association

Los Angeles, Calif., March 24, 1950.

Pay to the Order of Basio Giannoulia, $100.00.
One Hundred Dollars.

/s/ THEODORE GIANNOS.
15, Identification.

[Back]

[Endorsed]: /s/ BASIO YANNOULIA,
/s/ S. KLONARIS.

[Stamped]: Paid. [187]

No. 14418

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VASILIKI ANDRE GIANNOULIAS,

Appellant,

vs.

HERMAN R. LANDON, as District Director, Immigration and Naturalization Service, Los Angeles District,

Appellee.

APPELLANT'S BRIEF.

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No. 14418

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BASILIKI ANDRE GIANNOULIAS,

Appellant,

vs.

HERMAN R. LANDON, as District Director, Immigration and Naturalization Service, Los Angeles District,

Appellee.

APPELLANT'S BRIEF.

Jurisdictional Facts.

This case is brought before the Court on appeal from a judgment of the United States District Court in and for the Southern District of California, Central Division, filed June 14, 1954, denying a petition for writ of habeas corpus in a deportation matter and discharging an order to show cause [Tr. 39, 40].

The District Court had jurisdiction under Title 28, U. S. C. A. 2241 *et seq.,* and this Court has jurisdiction to review the judgment pursuant to Title 28, U. S. C. A. 1291.

There is involved in this case the validity of the second paragraph to Section 3 of the Act of May 14, 1937 (50 Stat. 165, 8 U. S. C. A. 213a) which reads as follows:

> "When it appears that the immigrant fails or refuses to fulfill his promises for a marital agreement made to procure his entry as an immigrant he then becomes immediately subject to deportation."

Statement of the Case.

The appellant is a native and citizen of Greece, born on July 16, 1912. She lived in Greece until March, 1950, at which time she embarked for Nassau, Bahamas, for the purpose of contracting marriage with John Fitsos, a resident and citizen of the United States. Prior to this embarkation, a courtship by correspondence of several months duration had occurred, the parties had exchanged photographs, and they had reached an agreement to marry.

The prospective husband, John Fitsos, a man of approximately 55 years in 1950, made arrangements to bring the appellant from Greece to Nassau, Bahamas. She arrived there on March 21, 1950 [Tr. 115]. Fitsos reached Nassau from the United States a few days later, approximately March 24, 1950 [Tr. 226], and the civil marriage ceremony was performed at Nassau on March 27, 1950 [Tr. 242]. Consummation of the marriage was postponed by agreement of the parties until a religious ceremony could be performed in the Greek Orthodox Church, Los Angeles, California, where the relatives of the bride and groom resided. Fitsos then filed a petition with the American authorities seeking recognition of the appellant as his wife, as well as her classification as a non-quota immigrant under the provisions of Section 4(a) of the Immigration Act of 1924 (8 U. S. C. A. 204(a)). This petition was approved on April 5, 1950 [Tr. 230], and the visa was issued to appellant by the American Consulate at Nassau, Bahamas on April 11, 1950 [Tr. 202]. Appellant and her husband proceeded to the United States together from Nassau, Bahamas, and she was admitted as a permanent resident at Miami, Florida, on April 13, 1950 [Tr. 202].

Fitsos separated from appellant within a few hours after the arrival and proceeded to Malone, New York for the alleged purpose of bidding farewell to his brother-in-law, Mr. George Smerlis, who was embarking on a trip to Greece. Fitsos agreed to meet appellant later in Los Angeles, California, and she proceeded alone to Los Angeles and was received into the home of her brother, Theodore Giannoulias, also known as Ted Giannos. Fitsos reached Los Angeles on or about April 26, 1950 [Tr. 212].

The contemplated religious ceremony in the Greek Orthodox Church was never performed. Appellant contends that she was ready and willing to proceed with such ceremony, but that John Fitsos became indifferent, refused to set a day certain to marry, made no effort to provide living quarters for her and did not even visit her at the home of her brother. The testimony of Fitsos is that appellant demanded a $5,000 checking account, an automobile and a five-family apartment house as conditions precedent to the religious ceremony.

Fitsos filed a suit for annulment of the marriage in Los Angeles, California, on May 18, 1950 [Ex. 3, Tr. 210]. Appellant established a domicile in the State of Nevada and filed a complaint for divorce [Ex. 9, Tr. 219]. Fitsos appeared in the Nevada action by counsel. Appellant was granted a decree of divorce on September 8, 1950, the court finding, among other things, that her allegation of the existence of the husband and wife relationship was true [Ex. 10, Tr. 223]. The annulment suit was thereafter dismissed by Fitsos on September 14, 1950 [Tr. 218].

A warrant for the arrest of appellant was issued by the Immigration and Naturalization Service on November 15, 1950, and served upon her on November 27, 1950 [Tr. 182, 183]. After a hearing before the administrative officials, appellant was ordered deported on the following charge:

> "The Act of May 14, 1937, in that, at the time of entry, she was not entitled to admission on the nonquota visa which she presented upon arrival for the reason that such visa was obtained through fraud, in that she contracted a marriage to procure entry to the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement."

Appellant's appeal to the Board of Immigration Appeals was dismissed on July 9, 1953 [Tr. 54], and a warrant for her deportation was issued on July 31, 1953 [Tr. 49].

Appellant has remained continuously in the United States since her arrival on April 13, 1950, and she resides at the home of her brother in Los Angeles, California.

The questions involved in this appeal are (1) whether the statute under which appellant has been ordered deported is a nullity because of ambiguity, indefiniteness and vagueness; (2) whether there is any reasonable, substantial and probative evidence supporting the charge in the warrant of deportation and (3) whether the deportation hearing was unfair by virtue of the receipt in evidence, over objection, of a communication from the Department of State purporting to show that appellant had knowledge of her status under the Greek quota.

Specifications of Error.

1. The District Court erred in concluding that the terms of the statute under which the appellant has been found deportable and ordered deported are constitutional on their face and as applied to the appellant.

2. The District Court erred in finding as a fact and concluding that there is reasonable, substantial and probative evidence to support the warrant of deportation.

3. The District Court erred in finding as a fact and concluding that the administrative hearing of the Immigration and Naturalization Service was fair.

The government placed in evidence as Exhibit 14 [Tr. 287] certain communications of the Department of State purporting to show that appellant had knowledge that a long wait would ensue before her name was reached for a Greek quota number. Counsel objected to the evidence on the ground that it was incompetent and hearsay [Tr. 134].

ARGUMENT.

I.

The Portion of the Deportation Statute Under Which Appellant Has Been Ordered Deported Is a Nullity Because of Vagueness and Uncertainty.

Appellant's deportation is sought under Section 3 of the Act of May 14, 1937 (8 U. S. C. A. 213a), specifically the last paragraph thereof. The entire section reads as follows:

> *"Deportation of alien securing visa through fraudulent marriage.*
>
> "Any alien who at any time after entering the United States is found to have secured either nonquota or preference-quota visa through fraud, by contracting a marriage which, subsequent to entry into the United States, has been judicially annulled retroactively to date of marriage, shall be taken into custody and deported pursuant to the provisions of section 214 of this title on the ground that at time of entry he was not entitled to admission on the visa presented upon arrival in the United States. This section shall be effective whether entry was made before or after May 14, 1937.
>
> "When it appears that the immigrant fails or refuses to fulfill his promises for a marital agreement made to procure his entry as an immigrant he then becomes immediately subject to deportation. May 14, 1937, c. 182 sec. 3, 50 Stat. 165."

Appellant urges that the language of the last paragraph of Section 3 poses several questions involving clarity. Specifically, what did the legislators mean by the phrase "promise for a marital agreement" as distinguished from the actual marriage itself? What is the nature of the

"promises"? What is the significance in the use of the masculine gender in the last paragraph?

Section 3 of the Act of May 14, 1937 (8 U. S. C. A. 213a) is no longer operative as it was expressly repealed by Section 403(a)(36) of the Immigration and Nationality Act of 1952 (66 Stat. 279).

The last paragraph of Section 3, of the Act of May 14, 1937, was not interpreted by any court during the 15½ years of its existence. In the original draft of the said Act (H. R. 28, 75th Cong., 1st Sess.), Section 3 contained the first paragraph only. The provision constituting the last paragraph was added by way of amendment from the floor of the House during the course of the debate (Cong. Record, 75th Cong., 1st Sess., Vol. 81, Part 2, pp. 2347-2351). Neither the House Report (No. 65. 75th Congress), nor the Senate Report (No. 426, 75th Congress) mentions the paragraph here involved.

There is an official executive interpretation of the last paragraph to Section 3. It was made by the Solicitor of Labor on May 22, 1940, for the Immigration and Naturalization Service, and this memorandum is being printed in full in the Appendix to this brief. The document points up the difficulty experienced by the government in visualizing the kind of case embraced within the scope of the paragraph.

It is well settled that a statute must be intelligently expressed and reasonably definite and certain, and that if it is too vague to be intelligible, it is a nullity. The "void for vagueness" doctrine may be used to test a deportation statute in view of the grave nature of deportation, *Jordan v. De George,* 341 U. S. 223, 71 S. Ct. 703, 95

L. Ed. 886, reh. den., 341 U. S. 956, 71 S. Ct. 1011, 95 L. Ed. 1377. It was said in that case at page 231:

> "The Court has stated that 'deportation is a drastic measure and at times the equivalent of banishment or exile * * *. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. Fong Haw Tan v. Phelan, *supra*." (333 U. S. 6, 68 S. Ct. 374, 92 L. Ed. 433.)

The *Jordan* case also asserts (pp. 231, 232) that the test of indefiniteness is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

In construing a statute, resorting to extrinsic facts is permitted where the language is ambiguous and the meaning of statutory language must be resolved against the background of the history and circumstances impelling the legislation as well as what may be gleaned from Congressional proceedings, *Matson Navigation Co. v. War Damage Corp.* (D. C. Cal.), 74 Fed. Supp. 705, affirmed, 172 F. 2d 942, cert. den., 337 U. S. 939, 69 S. Ct. 1515, 93 L. Ed. 1744. See also, *Harrison v. Northern Trust Co.*, 317 U. S. 476, 63 S. Ct. 361, 87 L. Ed. 407, wherein Mr. Justice Murphy said:

> "* * * words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" (Citing cases.)

Congressman Jenkins was quite verbose in the course of the House debate upon the imperfection of his amend-

ment (Cong. Record, 75th Cong., 1st Sess., Vol. 81, Part 2):

> (P. 2349) "Mr. Jenkins of Ohio. My purpose in offering this amendment is to put the amendment in the bill where the language is not perfect at all, so it will be a flag to the Senate when this bill gets over there which will give them to understand the purpose of the House is to clean this thing up. We want these people to understand that this is an important matter, and if they practice fraud they should not profit by it."
>
> (P. 2350) "Mr. Jenkins of Ohio. Mr. Speaker, I think we have gone into this matter far enough. I am not saying this amendment is etymologically perfect, but it is the best I can do at this time. We must not waste time. If there are any corrections to be made on it, they can be made in the Senate."
>
> (P. 2350) "* * * Let us allow the amendment to go through, and, if we find that the language is inconsistent, when it gets over to the Senate we can correct it."

The evidence fails to disclose any promises made by the appellant to Fitsos for the marital agreement. They exchanged mutual promises to marry and they did marry in good faith. The "promises," so says the statute, are only those *for* the marital agreement. Compliance with these "promises" would be fulfilled upon the creation of the valid marriage, in this case at Nessau, Bahamas, on March 27, 1950. This marriage continued to be valid until dissolved by the Nevada court on September 8, 1950, when appellant was awarded a divorce decree upon the ground of cruelty.

The ambiguity of the phrase "promises for the marital agreement" was apparent to the present lawmakers when enacting Section 241(c) of the new Immigration and Nationality Act effective December 24, 1952 (8 U. S. C. 1251(c)), a provision analogous to Section 3 of the Act of May 14, 1937. The pertinent portion of the new statute reads:

> "(c) An alien shall be deported * * * if * * * (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant."

All reference to any "promises" has now been eliminated, and what is condemned is a failure or refusal to fulfill the marital agreement itself.

The phrase "promises for the marital agreement" is much too vague and uncertain to give notice of the conduct proscribed. Although the statute here is not a criminal one, the penalty of deportation is even more stringent and hence, the statutory language should be strictly construed.

Appellant urges also that Section 3 of the Act of May 14, 1937, was directed against male immigrants only. The Senate did not debate the bill at all. The House debate, which is relatively short (Cong. Record, 75th Cong., Vol. 81, Part 2) concerns itself, as does the author of the amendment (Representative Jenkins of Ohio) with

the male immigrant who conspires with a citizen female to deceive the government officials by a bogus marriage arrangement. Excerpts from the debate follow:

At page 2348:

"Mr. Jenkins of Ohio: I know that can be done, of course; but suppose this arrangement is made between these two people with criminal intent in the minds of both; in other words, this man simply buys his way into this country by inducing this woman to enter into this contract, what right have the people of this country, what right have the immigration officials when this man has come to this country and not carried out his arrangement, has not lived with this woman, is not her lawful husband, and takes no responsibility of a husband? What is our right under this bill?

"Mr. Dickstein: There are other provisions of the 1917 law and the 1924 law to take care of people who actually commit a fraud upon the Government by signing a petition, because they are guilty of fraud in that instance.

"Mr. Jenkins of Ohio: That is what I am coming to.

"Mr. Dickstein: That has nothing to do with this bill.

"Mr. Jenkins of Ohio: There ought to be some provision in that record. It looks to me like the gentleman is simply playing into the hands of these people because the most trouble we have from what is trying to be cured here comes from men on the other side who buy their way into this country. They induce some woman to go through with this bogus marriage arrangement and never intend to carry it out. She is paid for it, and a woman could bring a man

into this country this month, another man next month, and so on, and could enter into the business of bringing men in. Under this bill she alone must raise the question. If she does not raise the question, we cannot do anything about it."

At page 2349:

"Mr. Jenkins of Ohio: Mr. Speaker, I want to develop the thought a little further. I think we can supply an amendment which will not hurt this bill but, on the contrary, will strengthen it a lot. We will find the place in this bill and insert one single amendment. I am not trying to delay the bill, I do not want to be put in the position of being against the bill, and I do not want to oppose it, but I think while we are at it we ought to put some teeth in these things. The women in these cases may not be to blame. Every time we have amended the law in this respect we have provided that a man may bring his wife in, but that the woman could not bring the husband in. Why? Because, in fact, we have said that the woman is the weaker of the two and is more susceptible to blandishments at the hands of men. It is thought that it would be pretty hard for a woman to induce a man to marry her for the purpose of assisting her to enter unlawfully, but it is easy for a man with a little money to come to this country on a visit, or acting through an emissary in this country to say to a woman: 'You go through this performance with me. It will all be perfunctory. Here is your thousand dollars and when I get there everything will be all right. I have paid you off.'

"My amendment should provide, when she comes to that place that she finds he is not going to go ahead with the marriage, and the immigration officials find both of them have conspired and that the marriage

has never been carried out, with the result that the immigration officials have been defrauded, they should have a right to put that man in the deportable class and send him out of the country."

The amendment proposed by Representative Jenkins included masculine pronouns, *i.e.*, "*his* promises for a marital agreement made to procure *his* entry as an immigrant *he* then becomes immediately subject to deportation." Turning again to the Immigration and Nationality Act of 1952 (8 U. S. C. A. 1251(c)), we see recognition by the lawmakers of the deficiency in gender appearing in Section 3 of the Act of May 14, 1937. The new section utilizes the words *"he or she"* and *"his or her."* These changes are rendered more striking by the fact that, of all the numerous classes of deportable and excludable aliens, Section 1251(c) is the only one employing the terms "he or she" and "his or her."

The court below states that the 1937 Act is to be interpreted according to the provisions of Title 1, U. S. C., Sec. 1, then in effect which stated: "Words imparting the masculine gender *may* be applied to females." When it appears, however, that the intent of the legislators was to curtail the acts of the masculine sex, it would not be unreasonable to restrict the language to that particular gender.

II.

There Is No Reasonable, Substantial and Probative Evidence Supporting the Deportation Charge Against Appellant.

The courts have long required that an order of deportation be supported by some substantial and probative evidence, *Schoeps v. Carmichael* (C. A. 9, 1949), 177 F. 2d 391, cert. den., 70 S. Ct. 576, 399 U. S. 914, 94 L. Ed. 1340; *Del Castillo v. Carr* (C. A. 9, 1938), 100 F. 2d 338.

Congress recognized this precept when enacting the Immigration and Nationality Act of 1952, for in Section 242(b) (8 U. S. C. A. 1252(b)) thereof it provided that no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence. Adverting for a moment to the memorandum of the Solicitor of Labor (see Appendix), we find the following language:

> "It is believed, therefore, that the following construction of the second paragraph of Section 3 is reasonably warranted: When the marriage of a citizen to an alien results in the alien spouse being admitted to the United States under a nonquota or preference-quota status, the alien's failure to continue to maintain and keep the marital status intact for some reason that is traceable back to the inception of the marriage and establishes the marriage to have been fraudulent from its very beginning, the alien spouse may be made the subject of deportation proceedings. Provided, of course, that the purpose for which the fraud was perpetrated was *'solely to fraudulently expedite admission to the United States.'* The language just quoted and italicized appears in its entirety in the title of the Act

> of 1937. While the usual rule of construction is, that the title of an act forms no part of the act itself, such title may, nevertheless, be resorted to for an explanation of the meaning of the text or language of the act proper. So using the title in this instance, the words 'through fraud, by contracting marriage' in Section 3 mean fraud perpetrated *solely to expedite admission to the United States.* That is a reasonable and logical limitation of the effect of the law in view of the fact that the primary purpose of the legislation is to prevent the abuse or misuse of certain provisions in the immigration laws of this country, and was not sponsored with a view to defending or protecting the integrity of the institution of marriage."

It seems clear, therefore, that to support the deportation charge against the appellant, the government must establish by reasonable, substantial and probative evidence that appellant's marriage was fraudulent from the beginning and that the purpose of the fraud was solely to fraudulently expedite admission to the United States. If appellant's marriage was based upon the usual considerations of love and affection and a desire to achieve the state of matrimony, or if it was not accomplished solely to fraudulently expedite admission to the United States, then the case of the government must fail.

The government is disposed to the belief that its principal witness, John Fitsos, was an innocent dupe to the marriage and that the alleged fraud was solely on the part of the appellant. If any fraud were perpetrated upon the government for the sole purpose of expeditiously securing the entry of appellant to the United States, John Fitsos would certainly be a partner of equal

guilt for it was he who filed a formal petition, under oath, for a nonquota immigrant visa for his "wife" at a time when the marriage had not been consummated. The factors which dispel the theory of fraud traceable back to the inception of the marriage are these:

1. Mr. Fitsos specifically authorized the appellant's brother, Theodore Giannoulias, to present his photograph and name to the appellant in Greece as a possible future suitor and husband. This authorization was given before she even knew of John Fitsos.
2. Mr. Fitsos and appellant exchanged correspondence for several months before she embarked for Nassau, Bahamas, for the marriage ceremony.

Appellant testified:

"Q. Between that time and the time you entered into the marriage with John Fitsos, did you correspond with him? A. Yes, we did correspond." [Tr. 113.]

"Q. Can you state approximately how many letters you received from him between the time your brothers mentioned this agreement and the time you left Greece to enter into the marriage? A. I received less than ten letters. I started corresponding with him after my brother came back here and he concluded the marriage transaction. In the meantime I was corresponding with my brother.

Q. And how many letters did you write to John Fitsos approximately during that period of time? A. I don't remember very well; about six or seven." [Tr. 114.]

"Q. When did you first hear of John Fitsos? A. 1949 when my brother came to Greece.

Q. And did you first hear of John Fitsos from your brother? A. Yes.

Q. After that did you receive any letters from John Fitsos? A. I received letters from him after my brother came to the United States in 1950.

Q. And did you write to him in response to letters he sent you? A. Yes." [Tr. 142-143.]

"Q. Over what period of time did your correspondence continue? A. One month.

Q. And about how many letters did he write you and how many did you write him? A. I don't remember exactly, about four or five letters." [Tr. 143.]

Mr. Fitsos testified:

"Q. Did you ever correspond with your wife? A. I wrote about three letters, and she answered. She never asked me then, what she asked face to face in Los Angeles.

Q. In your letters, did you agree to marry her? A. Yes." [Tr. 230.]

"Q. Had you received any letters from her? A. Three letters.

Q. Did you receive these letters after you had received her photograph from Ted Giannoulias? A. Yes, sir.

Q. Who wrote the first letter, you or her? A. I did.

Q. And she answered your letter? A. Yes, sir.

Q. What time of the year was that? A. That was the beginning of 1950 after her brother came back. He came back 8th of January, 1950, and he told me, 'Well, we can do nothing from Canada,' and then he gave me $300 to help me on the expenses." [Tr. 245-246.]

"Q. Then they arranged to bring your first wife to Nassau? A. That's right, and until she came over she answered about three or four letters to me of my mail." [Tr. 246.]

3. Fitsos agreed to marry the appellant before she undertook the journey to Nassau, Bahamas [Tr. 230].

4. Fitsos made the arrangements for appellant to journey to Nassau, Bahamas [Tr. 246].

Appellant is a religious girl of the Greek Orthodox faith. A civil ceremony alone is not recognized by the church, and it was only natural that she wished a church marriage in Los Angeles before her brother and relatives of the groom. Fitsos was agreeable to the arrangement to have a religious ceremony performed in Los Angeles, and he consented to "respect" the appellant until after the church marriage [Tr. 239, 250, 252]. He had been rebuffed by appellant in a premarital amorous attempt [Tr. 139], but his kisses were not rejected [Tr. 228, 252]. He remained with appellant in Nassau during the time required to secure the approval of the petition for the immigration visa and the actual issuance of that document. He accompanied her from Nassau to the United States where she was landed permanently at Miami, Florida as his wife. He left her immediately upon arrival in order to make a trip to Malone, New York, and she made her way alone to Los Angeles, California. This separation was not of her election or choosing.

While it is true that there is irreconcilable conflict in the testimony concerning the reason for the failure to have the religious ceremony performed after the arrival of

Fitsos in Los Angeles, California about April 27, 1950—and each party has supported corroboration from their respective family members—yet the lack of a church ceremony does not affect the validity of the marriage and does not *per se* demonstrate substantially and reasonably that appellant schemed and contrived from the very beginning to contract a fraudulent marriage solely to expedite her admission to the United States. She states at page 118 of the Transcript:

> "Q. Did you enter into this marital agreement for the purpose of facilitating your admission into the United States? A. No, I married him because I liked him as a husband and with the aim of getting married.
>
> Q. At the time you married John Fitsos in Nassau, Bahamas, was it your intention to live with him as man and wife following the marriage. A. Yes, yes, yes.
>
> Q. Why did you not live with John Fitsos as man and wife following your marriage on March 27, 1950? A. Because this was against our religious beliefs and I have been waiting to get married in the Greek Orthodox Church."

Coition, of course, is not necessary to create a valid marriage, *Martin v. Otis,* 233 Mass. 491, 124 N. E. 294; *Franklin v. Franklin,* 154 Mass. 515, 28 N. E. 681; *Mitchell v. Mitchell,* 136 Me. 406, 11 A. 2d 898; *Brooks-Bischoffberger v. Bischoffberger,* 129 Me. 52, 148 Atl. 606. Would one act of sexual intercourse or several acts have cured the defect alleged by the government to exist in the marriage of the appellant? If appellant had the cunning and acumen that the government attributes to her, namely, the planning and execution of a fraudulent

marriage from the very beginning, it seems likely that foresight would have impelled her to submit to Fitsos at least once.

Appellee, it appears, is conceding the validity of the marriage performed on March 27, 1950 at Nassau, Bahamas. Only the alleged failure or refusal to fulfill the promises for the marriage agreement is attacked. The lower court opines also that the validity or invalidity of the marriage is of no consequence. Nevertheless, it follows that the existence of a valid marriage would encompass all of the elements and incidents of that relationship. The marriage contract was complete when entered into and existed until a divorce decree was granted on September 8, 1950. The warrant of arrest in deportation proceedings was not issued until November 15, 1950 [Tr. 183], more than two months after the dissolution of the marriage. It is inconsistent, therefore, to hold, on the one hand, that a valid marriage was created on March 27, 1950 which existed until September 9, 1950, yet issue a formal accusation in November, 1950 that appellant "fails and refuses" to fulfill her promises for a marital agreement.

Representative Jenkins, the author of the last paragraph to Section 3 stated in the Congressional Record of March 17, 1937, at page 2350:

> "* * * This is what my amendment does. It simply provides that whenever any alien is permitted to enter this country upon certain representations as to his present or intended marital relationships, and later it is discovered that he has made misrepresentations, he is then subject to deportation. Why should he not be deported? To whom does he make such misrepresentations? He makes them to

> the American officials in a foreign country. He deceives our own immigration officials there and as soon as they find he has deceived them or has practiced deceit, why should they not have the authority to say to him, 'You have deceived us, you have lied to us, and now you are in the deportable class and we are going to send you back.' *What is the use of waiting for a court decree?* As soon as they find out he has misrepresented basic and cardinal facts in the statement which he has to file, what is the use of temporizing with him? * * *" (Emphasis added.)

It is plain that Mr. Jenkins and the Congress in passing his amendment intended that the last paragraph of Section 3 operate in cases where an adjudication of a competent court had not been made. In appellant's case, the existence of the marital status and her right to a divorce on the ground of cruelty had been properly and completely determined by the Nevada court on September 8, 1950, more than two months prior to the service upon her on November 27, 1950 of a warrant of arrest in deportation proceedings. After the intervention of the court, by a valid decree, it could not longer be charged that appellant "fails or refuses" to carry out promises for a marital agreement. This premise gains support from the use of the words "immediately deportable" in the last paragraph to Section 3. Congressman Jenkins wanted the man expelled immediately and before the court had passed upon the marriage relationship, but this is not the case at bar.

The foreword to both House Report No. 65 and Senate Report No. 426 accompanying H. R. Bill No. 28, enacted as Section 3 of the Act of May 14, 1937, contains a

statement by Mrs. O'Day from the Committee on Immigration and Naturalization as follows:

> "This bill does not bring within its purview cases in which divorce, separation, abandonment is the action by which such marriages between aliens and citizens are terminated. Only the judicial annulment of such marriages by an American court, retroactive to the date on which such marriages were contracted, justifies deportation of the alien spouse under the provisions of this bill."

In other words, the issue of whether any fraud had been perpetrated in undertaking the marriage was wisely left to the judgment of a court, and only an annulment satisfies the statute.

The Solicitor of Labor made it very clear in his memorandum (see Appendix) that the last paragraph to Section 3 does not apply where a divorce is granted. He said:

> "While it is obvious that the language of the second paragraph of Section 3 is not very clear, it certainly contains nothing, nor does the debate, indicating that it was the intention to deprive either of the parties to the marriage of the right of obtaining a *divorce.* The word *'divorce'* is used nowhere in the debate. The function of *divorce* is so well known throughout the United States that it is only reasonable to assume that the term itself would have been expressly used had the amendment been intended to, in effect, prohibit the dissolution of the marriage in that way. At the time the legislation was enacted, Congressman Jenkins had been a member of the Bar for thirty years, and had been prosecuting attorney for two terms in Lawrence County, Ohio. Therefore, if it had been his intention to enlarge the scope of the

law by making it applicable to a dissolution of a marriage by divorce, he undoubtedly would have said so. His failure to do so must be interpreted as indicating a lack of such intention on his part, or of the legislature as a whole."

Fitsos, it will be noted, remarried in Greece in March, 1951 [Tr. 264]. He married a girl from the home town (Kamari, Greece) of his brother-in-law, George Smerlis. It will be recalled that Fitsos left his bride at Miami, Florida, for the purpose of seeing his brother-in-law shortly before the latter embarked for Greece. It is not inconceivable that Fitsos was disappointed in the appellant as a "picture" bride and believed that she would be a younger looking woman; that he went through the marriage ceremony in Nassau, Bahamas only because of the commitments already made to appellant; that he began with Smerlis a search for his second bride even before his first marriage was dissolved; that he was, as appellant charges, cold and indifferent when he arrived in Los Angeles, would not set a date for the religious ceremony, and was quite agreeable to the divorce which resulted in a prompt release from the matrimonial state. The accusation of John Fitsos that the religious ceremony was prevented by the appellant's pecuniary demands for a $5,000 checking account, an automobile, and a five-family apartment house, is highlighted and debilitated by his testimony of January 12, 1951 [Tr. 237], that appellant was preparing to marry another person and was now demanding a $10,000 checking account, a Cadillac automobile, and an apartment house for ten families. It is remarkable that the appellant, a girl from the Greek countryside, should develop in a short time such consistent mercenary attributes.

It was said in *United States ex rel. Lindenau, et al. v. Watkins,* (D. C. N. Y., 1947), 73 Fed. Supp. 216 (reversed on other grounds, 164 F. 2d 457), at page 221:

> "Substantial evidence is evidence of such validity and weight as would be sufficient to justify a reasonable man in drawing the inference of fact which is sought to be sustained. It implies a quality of proof which induces conviction and which makes a definite impression on reason. It must be more than a scintilla of evidence, and more than suspicion or surmise. It must be more satisfying than hearsay or rumor. Mere rags and tatters of evidence are not sufficient. Some courts have gone as far as to say that evidence subject to either one of two inferences is not substantial. The test in determining what constitutes substantial evidence in an administrative proceeding is the same as that applied in trials by jury.
>
> "This doctrine is of the utmost importance. It must be borne in mind that administrative authority is frequently delegated to subordinates who act in the name of the head of the agency to which they are accredited. In this respect the administrative process is vastly different in its essential nature from the judicial process. This circumstance makes it indispensable that the decisions of administrative agencies, which frequently dispose of important personal and property rights, should be subject to the substantial evidence rule. For example, in the present instance, the liberty of a human being and his entire future are at stake. This is generally the case in proceedings under the immigration laws. For these reasons the requirement of substantial evidence should be rigidly enforced in such proceedings."

Appellant urges that there is no substantial, reasonable or probative evidence establishing that she contracted marriage fraudulently for the sole purpose of fraudulently expediting her entry into the United States.

III.

The Deportation Hearing Was Unfair Because of the Receipt in Evidence of Communications From the State Department Without a Disclosure of Other Communications Having a Bearing Upon the Same Issue.

There was received in evidence as Exhibit 14 of the deportation hearing, over objection of counsel [Tr. 134], certain governmental communications, particularly one of the American Embassy, Athens, Greece, dated January 25, 1952, purporting to rebut appellant's statement that about December, 1949 she was promised by the American Consul in Greece that she "was among the first to come to the United States and (her) visa was coming up" [Tr. 117-118]. The exhibit, contends the government, establishes that she would have had an interminable wait to secure a Greek quota visa, and hence that her marriage to Fitsos was solely to fraudulently expedite the issuance of an immigration visa.

Appellant first registered under the Greek quota about 1937 and was assigned No. 285 [Tr. 170]. The Embassy's letter [Ex. 14] admits that she filed a visa application "prior to the war." The said communication further states that in accordance with Department instructions, all "pre-war lists were destroyed," but it does not state when this instruction was given nor whether the appellant was so notified. Neither is there any revelation of how the appellant "re-applied" for registration on September

10, 1947, and was given No. 6483 at that time. The appellant testifies as follows [Tr. 117-118]:

> "Q. At the time you left Greece did you believe that you would be able to enter the United States for permanent residence without entering into a marital agreement with a United States citizen? A. Certainly, yes. I had been waiting for my visa.
>
> Q. Had you been notified that the visa would soon be available to you? A. The American Consul in Greece had promised me that I was among the first to come to the United States and my visa was coming up.
>
> Q. When did he promise you this? A. He has written me about it, the American Consul, and also he verbally told me so in December, 1949."

Appellant's brother, Theodore Giannoulias, asserts [Tr. 170] that he personally appeared before the American Consul in Athens in 1949 relative to his sister's visa case and that the officials were indefinite and stated: "We don't know what is going to happen from day to day, what orders we are going to receive from Washington." A person who had waited some 13 years to enter the United States, as did the appellant, might be entitled to some belief that her name would be reached in the reasonably near future after so long a time had elapsed.

The Board of Immigration Appeals in its decision of July 9, 1953 [Tr. 18] utilized Exhibit 14 to contradict appellant's statement that she believed a quota visa would be forthcoming to her soon. Accordingly, it was an act of unfairness for the government not to present for inspection and examination the complete file of the American Consul at Athens, Greece relating to the appellant so that the scope of the "re-registration" in 1947 could

be ascertained and other communications or notes bearing upon the question of knowledge of the appellant of her position on the quota waiting list could be uncovered.

The error of an administrative tribunal may be so flagrant as to convince a court that the hearing accorded an alien was not a fair one., *Kwock Jan Fat v. White,* 253 U. S. 454, 457, 40 S. Ct. 566, 64 L. Ed. 1010; *Bridges v. Wixon* (C. A. 9, 1944), 144 F. 2d 927, 931.

Conclusion.

Appellant urges that neither the law nor the evidence supports the order for her deportation. Her long and cherished wish of living in the United States should not be extinguished without reasonable, substantial and probative evidence.

Wherefore, appellant prays that the judgment of the lower court be reversed and that she be discharged from the custody of the Immigration and Naturalization Service.

Respectfully submitted,

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By Marshall E. Kidder,
Attorneys for Appellant.

APPENDIX.

55804/996 May 22, 1940

Memorandum for the Immigration and Naturalization Service.

In Re: Interpretation of the last paragraph of Sec. 3 of the Act of May 14, 1937 (50 Stat. 164; U. S. C., ti. 8, sec. 213a) entitled an Act to authorize the deportation of aliens who secured preference-quota or non-quota visas through fraud by contracting marriage solely to fraudulently expedite admission to the United States, and for other purposes.

The Central Office requested an opinion interpreting the second paragraph of Sec. 3 of the said Act of May 14, 1937. That section reads, in its entirety, as follows:

"SEC. 3. That any alien who at any time after entering the United States is found to have secured either non-quota or preference-quota visa through fraud, by contracting a marriage which, subsequent to entry into the United States, has been judicially annulled retroactively to date of marriage, shall be taken into custody and deported pursuant to the provisions of section 14 of the Immigration Act of 1924 on the ground that at time of entry he was not entitled to admission on the visa presented upon arrival in the United States. This section shall be effective whether entry was made before or after the enactment of this Act.

"When it appears that the immigrant fails or refuses to fulfill his promises for a marital agree-

ment made to procure his entry as an immigrant he then becomes immediately subject to deportation."

The Act had its origin in bill H.R. 28, in the 1st Session of the 75th Congress. As originally drafted and unanimously approved by the House Committee on Immigration and Naturalization, also as approved by this Department, Sec. 3 consisted of the first paragraph only, as it was eventually enacted into law. When the bill was debated in the House of Representatives, the provision now constituting the second paragraph of Sec. 3 was added as an amendment. Neither House Report (No. 65, 75th Cong.) nor Senate Report (No. 26, 75th Cong.) contains any reference to, or discussion of, that paragraph. As the addendum was made in the course of the debate in the House, the only source of information available that throws any light on its meaning is what was said in the debate as set forth in the Congressional Record (Vol. 81, Pt. 2, p. 2347, *et seq.*).

Prior to considering what transpired in that debate, it might be well to consider the antecedent history leading up to the enactment of the law, as revealed by files of this office, so as to make clear just what were the prevailing evils it was desired to have the new legislation remedy and cure, and the object and purpose it was intended to have it accomplish. The most important case seems to have been that of Mary Toutoundjy or Shashaty (file 55644/630; Solicitor's file 4-2314). Born in Syria about the year 1910, she went to Cuba in the year 1925 with her aunt. On December 23, 1925, she was married in Havana by a civil ceremony to Joseph A. Shashaty, a citizen of the United States and a resident of Paterson, New Jersey, who about three weeks previously had met

ıer for the first time in Havana. Shortly after the mar-riage, he made application to this Department through the American Consul General at Havana for a non-quota immigrant status for his wife under the provi-sions of Section 4(a) of the Immigration Act of 1924 (Act of May 26, 1924; 43 stat. 155; U. S. C., ti. 8, sec. 155) which confer that status upon the alien wife of a citizen of the United States. Because of business de-mands the husband returned to the United States with-out his wife. On the basis of the non-quota immigration visa issued to her, the wife was admitted to the United States at Key West, Florida, February 4, 1926. She stated at the time of that entry that she was destined to her husband, Joseph A. Shashaty, of Paterson, New Jersey.

They never lived together as man and wife at any time. Therefore, the marriage was never consummated. Each gave varying reasons for that situation, the hus-band claiming that it was because of unwillingness on her part, stating she had said she would not live with him until a religious ceremony was performed, and never would go through such a ceremony with him, either in Cuba or the United States. She, of course, made accusa-tions against him which it seems unnecessary to discuss. It is sufficient to say that the husband brought a pro-ceeding in the Chancery Court in the State of New Jersey and obtained a decree annulling the marriage on the ground that it was brought about through fraud per-petrated by the wife, in that in entering into the marriage she had no matrimonial intent, but simply used the cere-mony to facilitate her entry into the United States under the immigration laws.

word "and". Congressman Jenkins himself admitted that the language of the amendment was not perfect. He had hopes, however, that the Senate might supply the necessary clarification, saying: "Let us allow the amendment to go through, and, if we find that the language is inconsistent (evidently, with the preceding portion of Section 3) when it gets over to the Senate we can correct it." The Senate, however, does not seem to have considered the amendment. At least it is not discussed in Senate Report No. 426, nor is it mentioned in the debate of the Senate, as that body passed H. R. 28, together with several other bills dealing with the subject of immigration at the same time without any debate or discussion on the floor of the Senate (*Ibid.,* Pt. 4, p. 4089).

While the general rule of statutory construction is, that statements made in debates in Congress may not be used to explain the meaning of the language of a statute, an exception thereto applies where the language of an act of Congress is not clear and enlightenment is sought from the explanations given on the floor of the Senate or House by members thereof in charge of the measure (Wright v. Mountain Trust Bank, 300 U. S. 440, 57 S. Ct. 556). While Congressman Jenkins was not in charge of H.R. 28, it was he who proposed the amendment and, naturally, his own statements ought to be considered in determining the purpose and object the amendment was intended to serve. All of his statements are not quoted herein, as it is believed the one now about to be quoted sufficiently reflects his views. After Chairman Dickstein, of the Immigration and Naturalization Committee, had explained that, under the bill as it then stood, after a court had decreed that the marriage of an alien

to a citizen was obtained, or entered into by fraud, solely to enable the alien to enter the United States under exemptions from the usual legal requirements, the Department of Labor would then have the right to deport the alien who perpetrated such fraud, Congressman Jenkins made the following reply (*Ibid,* Pt. 2, p. 2348):

> "I know that can be done, of course; but suppose this arrangement is made between these two people with criminal intent in the minds of both; in other words, this man simply buys his way into this country by inducing this woman to enter into this contract, what right have the people of this country, what right have the immigration officials when this man has come to this country and not carried out his arrangement, has not lived with this woman, is not her lawful husband, and takes no responsibility of a husband? What is our right under this bill?"

The foregoing and other statements in the debate indicate that the amendment was aimed at cases in which a marriage took place abroad between an alien and a citizen; that, as the result thereof, the alien spouse gained admission to the United States, either as a nonquota or preference-quota immigrant, and, after entering the United States, refused or failed to *continue to* maintain and keep up the marital relation with his or her citizen spouse for some reason that indicates there was a lack of a bona fide matrimonial intent at the inception of the marriage; that the marriage was entered into solely for the purpose of enabling the alien to enter the United States, and the purported marriage has not been annulled by a judicial decree. In other words, Congressman Jenkins wanted a provision in the statute which would authorize the deportation af aliens in certain cases without the necessity

of having entered a judicial decree of annulment retroactive to the date of the marriage. His other statements in the debate and those of other persons who participated therein seem to reflect the same intention.

It is believed, therefore, that the following construction of the second paragraph of Section 3 is reasonably warranted: When the marriage of a citizen to an alien results in the alien spouse being admitted to the United States under a nonquota or preference-quota status, the alien's failure to continue to maintain and keep the marital status intact for some reason that is traceable back to the inception of the marriage and establishes the marriage to have been fraudulent from its very beginning, the alien spouse may be made the subject of deportation proceedings. Provided, of course, that the purpose for which the fraud was perpetrated was *"solely to fraudulently expedite admission to the United States."* The language just quoted and italicized appears in its entirety in the title of the Act of 1937. While the usual rule of construction is, that the title of an act forms no part of the act itself, such title may, nevertheless, be resorted to for an explanation of the meaning of the text or language of the act proper. So using the title in this instance, the words "through fraud, by contracting marriage" in Section 3 mean fraud perpetrated *solely to expedite admission to the United States*. That is a reasonable and logical limitation of the effect of the law in view of the fact that the primary purpose of the legislation is to prevent the abuse or misuse of certain provisions in the immigration laws of this country, and was not sponsored with a view to defending or protecting the integrity of the institution of marriage.

Nice questions arise as to what is necessary to bring an alien within the language "fails or refuses to fulfill his promises." Supposing, for instance, the citizen spouse obtains a divorce from the alien husband for something that originated or occurred after entry into the United States, but in no way indicates that the marriage was fraudulently entered into solely to enable the alien spouse to enter the United States. Or, suppose the alien spouse obtains a divorce under the circumstances just stated. In neither instance would the fact of dissolution of the marriage by *divorce* render the alien spouse subject to deportation." While it is obvious that the language of the second paragraph of Section 3 is not very clear, it certainly contains nothing, nor does the debate, indicating that it was the intention to deprive either of the parties to the marriage of the right of obtaining a *divorce*. The word *"divorce"* is used nowhere in the debate. The function of *divorce* is so well known throughout the United States that it is only reasonable to assume that the term itself would have been expressly used had the amendment been intended to, in effect, prohibit the dissolution of the marriage in that way. At the time the legislation was enacted, Congressman Jenkins had been a member of the Bar for thirty years, and had been prosecuting attorney for two terms in Lawrence County, Ohio. Therefore, if it had been his intention to enlarge the scope of the law by making it applicable to a dissolution of a marriage by divorce, he undoubtedly would have said so. His failure to do so must be interpreted as indicating a lack of such intention on his part, or of the legislature as a whole.

It seems rather difficult to visualize the kind of cases at which the amendment was directed. Its sponsor appears

to have had in mind the case of a woman citizen marrying an alien husband, and after his entry into the United States he would abandon the marital relation, but notwithstanding such abandonment, the citizen wife would take no steps to have the marriage annulled. Without the cooperation of the wife, it manifestly will almost be impossible for the immigration authorities to obtain sufficient evidence to develop a case under the statutory provision in question. For that reason the second paragraph of Section 3 may turn out to be a dead letter, incapable of enforcement.

I might, however, refer to an actually adjudicated case to which that paragraph could be held to apply. It was decided by the Court of Errors and Appeals of the State of New Jersey, February 4, 1931. It is entitled Salzberg v. Salzberg, 103 Atl. 605. The facts therein show that Mr. Salzberg was a widower, with three children. The woman in the case—an alien—was already under an order of deportation. (As her maiden name is not stated in the Court's opinion, efforts made to identify the case from the immigration indexes proved unsuccessful.) Through the manipulation of her mother, the alien married Salzberg. Some time thereafter, Mr. and Mrs. Salzberg, accompanied by some other persons, went to Canada, apparently to enable the wife to obtain an immigration visa for use in being lawfully admitted to the United States. After her reentry into this country, she discontinued living with her husband. He brought a suit, seeking a decree of annulment of the marriage. It was granted in the lower court, but reversed by the appellate court for the following reasons stated in its opinion:

> "[1, 2] It seems quite apparent from the evidence that no love could have entered into the mar-

riage. It appears to have been a cold businesslike proposition on the part of the parties. The wife, in order to remain in this country, wished to marry an American citizen, and the husband wished to obtain some one to care for his children. There is a failure of proof of fraud for the reason that the petitioner admits he knew the motive of the wife two days prior to the marriage. The marriage took place and was consummated. There is nothing in the evidence which satisfactorily proves that either of the parties at the time the marriage ceremony was performed were misled by fraudulent statements or misrepresentations of one to the other. In order to determine what will constitute sufficient fraud to annul a marriage, regard must be had for the whole status of both parties and the circumstances which induced the contract. As a matter of fact it seems that each intended to fulfill their part of the agreement at the time the ceremony was performed, although it appears that there was no affection between them before or at the time of marriage. A marriage cannot be annulled for the reason only that no love existed between the parties to the marriage at the time thereof. Such a procedure would be to establish a dangerous precedent and open the door to an easy method of setting aside marriage contracts. We are therefore of the opinion that there was not sufficient fraud shown on the part of the wife which induced the husband to marry her and which would satisfy the court in annulling the marriage.

"The decree of the Court of Chancery is therefore reversed with costs."

As will have been noted, the Court found that the alien woman entered into the marriage "in order to remain in this country." The fact that she was in the United States when the marriage was entered into would not prevent the statute from applying. While there is no express provision in the Act of 1937 dealing with the location or place where the marriage occurs, it is obvious that the protection of the law is just as much needed in connection with marriages performed in the United States, as those performed elsewhere.

GERARD D. REILLY,
Solicitor of Labor.

Attachments
EJG KL

No. 14418.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BASILIKI ANDRE GIANNOULIAS,

Appellant,

vs.

HERMAN R. LANDON, as District Director, Immigration and Naturalization Service, Los Angeles District,

Appellee.

BRIEF FOR APPELLEE.

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Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

This matter arose on a Petition for a Writ of Habeas Corpus in the United States District Court for the Southern District of California, Central Division. The Writ was denied and the Order to Show Cause was discharged.

The District Court had jurisdiction of the matter under Title 28 U. S. C. A. 2241 and this Court has jurisdiction to review the final order on appeal under Section 28 United States Code 2253.

Statute Involved.

Section 213a of Title 8 U. S. C. A. provided as follows:

> "213a. Deportation of alien securing visa through fraudulent marriage.
>
> Any alien who at any time after entering the United States is found to have secured either non-quota or preference-quota visa through fraud, by contracting a marriage which, subsequent to entry into the United States, has been judicially annulled retroactively to date of marriage, shall be taken into custody and deported pursuant to the provisions of section 214 of this title on the ground that at time of entry he was not entitled to admission on the visa present upon arrival in the United States. This section shall be effective whether entry was made before or after May 14, 1937.
>
> When it appears that the immigrant fails or refuses to fulfill his promises for a marital agreement made to procure his entry as an immigrant he then becomes immediately subject to deportation."

The instant case is within the purview of the second paragraph of the foregoing statute.

(The 1952 Immigration and Naturalization Act re-enacted the above section as subdivision (2) of subdivision (c) of Section 1251 of Title 8, United States Code, making some changes in the wording but retaining the same legal effect.)

Statement of the Case.

The appellant, born in Greece on July 16, 1912 and a native and citizen thereof, entered the United States by way of Miami, Florida, on April 13, 1950, after contracting a marriage with an American citizen, John Petros Fitsos, at Nassau, Bahama Island, on March 27, 1950 [Tr. 28].

Arrangements for the marriage arose as a result of discussions between appellant's brother, Theodore Giannoulias, and one, George Fitsos, the brother of John Fitsos. Both Theodore and George were employees of the same restaurant in Los Angeles [Tr. 150]. George's brother desired to get married and Theodore had an unmarried sister in Greece. Consequently, the discussions led to the sister (appellant) being brought to Nassau. John Fitsos proceeded to Nassau where he married appellant in a civil ceremony, John having spent some $700 of his own funds to bring the appellant over from Greece [Tr. 50, 231].

Some three weeks after the marriage, appellant's visa was secured from the American Consul in Nassau [Tr. 227], and the next day, on April 13, 1950, the appellant and her groom entered the United States at Miami, Florida, the appellant being admitted as a nonquota immigrant under Section 4(a) of the Immigration Act of 1924 (8 U. S. C. 204) as "the wife * * * of a citizen of the United States * * *" [Tr. 50].

According to both the statements of appellant and the husband, John Fitsos, he was desirous of consummating the marriage before arriving in the United States, but bowed to the appellant's wishes that they not assume the man and wife relationship until after they were married in the Greek Orthodox Church in Los Angeles [Tr. 72].

Upon arriving in the United States, the appellant proceeded to the home of her brother, Theodore Giannoulias, in Los Angeles, California, while the groom, John Fitsos, went to Malone, New York, to take care of some business. He proceeded to Los Angeles some 10 days later and contacted the appellant and her brother. Both the appellant and the witnesses generally agree as to the facts up to this point, but they disagree as to the events thereafter.

The groom, John Fitsos, testified that after arriving in Los Angeles, the appellant refused to marry him by church ceremony or be his wife until he showed that he was in possession of certain moneys, properties and established in business [Tr. 232, 254-260]. His testimony as to these financial demands is corroborated by the testimony of his brother, George Fitsos [Tr. 184-192].

The appellant, on the other hand, has testified that upon arrival in Los Angeles, John Fitsos was cool, indifferent and reluctant to enter into the agreements previously made. Her testimony is corroborated by that of her brother Theodore Giannoulias.

John Fitsos had married the appellant at Nassau, had spent over $700 to bring her there, had come from Malone, New York to Los Angeles for the sole reason of going through with the marriage, and had nothing to gain other than a wife.

The appellant, however, had been seeking for 14 years to come to the United States [Tr. 117] and there were still some 6,000 ahead of her on the quota list in 1950 that were entitled to prior consideration because of their earlier application [Tr. 289-290].

John Fitsos filed a suit for annulment of the marriage in California in the Los Angeles Superior Court on

May 18, 1950 [Tr. 210]. The appellant filed a suit for divorce from Fitsos on September 8, 1950 in the State of Nevada, and she was granted a divorce the same day [Tr. 219, 223]. Thereafter Fitsos dismissed his suit for annulment on September 14, 1950. He had been told that the appellant would fight the annulment suit, and that he would have to pay court costs and his attorney advised that he let the appellant go to Reno and get the divorce [Tr. 238].

The warrant for the arrest of appellant was issued by the Immigration and Naturalization Service on November 15, 1950, and served upon her on November 27, 1950 [Tr. 182, 183]. After hearings before the officers of the Immigration and Naturalization Service on January 4, 1951, February 8, 1951 and April 16, 1952, the appellant was ordered deported on the following charge:

> "The Act of May 14, 1937, in that, at the time of entry, she was not entitled to admission on the non-quota visa which she presented upon arrival for the reason that such visa was obtained through fraud, in that she contracted a marriage to procure entry to the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement."

The Order of Deportation was affirmed by the Acting Assistant Commissioner of Immigration on May 23, 1952 and sustained on appeal by the Board of Immigration Appeals on July 9, 1953 [Tr. 54]. The warrant for her deportation was issued on July 31, 1952 [Tr. 49].

Appellant was thereafter taken into custody and a Petition for Writ of Habeas Corpus followed [Tr. 3-9]. Upon the Writ being denied [Tr. 28-39] this appeal followed.

ARGUMENT.

I.

The Statute Is Not Vague and Uncertain.

The first point raised by the appellant is that the statute is unconstitutional because of vagueness and uncertainty. Appellant asks specifically "What did the legislators mean by the phrase 'promise for a marital agreement?' "

Throughout the lower court's "Memorandum for Order" [Tr. 28-33], the Judge uses the language "marital agreement, *i. e.* marriage" and paraphrases this section [Tr. 32]: "The petitioner failed and refused to fulfill her promises made in connection with the marital agreement [*i. e.,* the marriage], which was made to procure her entry as an immigrant."

The language is further clarified when modified with the phrase in the statute immediately following the words "marital agreement" which then make the phrase read "fails or refuses to fulfill his promises for a marital agreement *made to procure his entry as an immigrant.*" (Emphasis added.)

What kind of a marital agreement that one could make "promises for" could *procure his entry as an immigrant?* Under the law a quota immigrant could gain immediate entry as a non-quota immigrant as "the wife of a citizen of the United States." No other type of marital agreement except "marriage" would have the effect of procuring entry as an immigrant.

Thus, common sense gives that interpretation to the statute which was given by the Solicitor of Labor, quoted at page 14 of the appellant's brief as excerpted from the

appendix to appellant's brief "when the marriage of a citizen to an alien results in the alien's spouse being admitted to the United States under a non-quota or preference-quota status, *the alien's failure to continue to maintain and keep the marital status intact* for some reason that is traceable back to the inception of the marriage and establishes the marriage, to have been fraudulent from its very beginning, the alien's spouse may be made the subject of deportation proceedings." (Emphasis added.)

The Judge of the lower court states [Tr. 29]:

> "I find nothing in the terms of the statute or upon its face which suggests that degree of ambiguity or uncertainty required to hold an Act of Congress unconstitutional."

The Court goes on later to use the language [Tr. 31]:

> "From the plain reading of the Section it is the failure and refusal to keep the promises for a marital agreement, not the agreement itself or any virtue or fault of the marital agreement itself, which the Act condemns."

Thus the Court gives the clear reading of the simple language of the statute with "marital agreement" meaning "marriage" and "promises for a marital agreement" meaning in effect—the marriage vows.

The Supreme Court has said that not only the "context of the language in question" [*American Communications Ass'n v. Douds,* 339 U. S. 382 at 412] but "the entire text of the statute" [*Winters v. New York,* 333 U. S. 507, 518] are to be considered in determining whether a statute is too vague. Obviously then, it is proper to take into account the modifying words "made to procure his entry as an immigrant" in the same paragraph, when it

indicates clearly what is meant by the language in question. It has already been noted that the only marital agreement which could procure entry as an immigrant would be marriage to an American citizen. Thus, "promises for a marital agreement" can only mean that the immigrant failed or refused to fulfill the marriage.

By the same language of the Supreme Court, quoted in the preceding paragraph, it is proper to take into account the first paragraph of said statute which refers to securing a non-quota visa by "contracting a marriage which, subsequent to entry into the United States, has been judicially annulled * * *."

Thus, in reading "the entire text of the statute", we see that the first paragraph of Section 213a applies to a marriage subsequently annulled whereas the second paragraph of 213a, the one herein question, refers to a marriage which the defaulting party fails or refuses to fulfill.

Hence the test as laid down by the Supreme Court is whether a statute is so vague that it does not convey a "sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices."

Jordan v. DeGeorge, 341 U. S. 223, 231, 232;

Connally v. General Construction Company, 269 U. S. 385, 391;

Dennis v. United States, 341 U. S. 494, 515.

In applying this test the Supreme Court has declared:

1. That the presence of difficult "borderline" or "peripheral" cases does not invalidate a statutory provision where there is a hard core of circumstances to which the statute unquestionably applies and as to which the ordinary person would have no doubt as to its application.

2. That it is proper to look at "the entire text of the statute."

3. That the "particular context is all important" and

4. That the inquiry is whether the statute is sufficiently explicit to inform those "who are subject to it, those to whom the statute is directed."

Believing that this Court may desire to refer to the entire text of the Congressional Record pertaining to the statute rather than the quotations set out by the appellant's brief, appellee has included as an appendix to this brief the complete Congressional Record pertaining to the legislation in question.

Appellant next urges that the statute in using the masculin gender has confined its application to male immigrants.

The lower court answers this contention by a statement in his Memorandum for Order "The Act of 1937 is to be interpreted according to the provisions of Title I, United States Code, §1 which states, *inter-alia,* 'words importing the masculine gender may be applied to females.' "

Here too we look to "the entire text of the statute" which begins: "Any alien who at any time * * *". It should be noted that the language does not say "any *male* alien" and referring to the second paragraph of 213a which states "when it appears that the immigrant fails * * *" it does not say "when it appears that the *male* immigrant * * *—"

This Court had occasion to interpret another statute that it was contended was void for vagueness, to-wit: 8 U. S. C. A. 144(a)(2) dealing with transportation of aliens within the United States. The case in question

which this Court decided was *Faustina Herrera v. United States of America* decided November 19, 1953, 208 F. 2d 215. This Court there upheld the validity of the statute and in so doing stated at page 217:

> "Thus it is manifest that the 'he' and 'his' of paragraph (2) refer to the phrase 'any alien' * * *"

Thus, in the same context, it would be ridiculous to state that the statute prohibiting transportation of aliens applied only to male aliens or male transporters. Likewise in the instant statute the contention would be as ridiculous.

II.

There Is Reasonable Substantial and Probative Evidence Supporting the Deportation Charge Against Appellant.

Appellee does not disagree with appellant's contention that an order of deportation must be supported by some substantial and probative evidence.

Taking this record as a whole, it is obvious that the appellant's primary desire was "to get here". She was some 6000 down on the list of immigrant applications. She had waited some 14 years to come to the United States and her chances of entry as a quota immigrant were very slim during her lifetime. The marirage was merely a means to an end, the end being entry into the United States and the opportunity to live in Los Angeles with her brother.

Contrast this with the conduct of the groom John Fitsos. He wanted to get married. He advanced over $700 of his own funds to bring his intended bride to

Nassau. He married her at Nassau and sought to consummate the marriage. He had been in business for many years around Washington, D. C. and Malone, New York, places that he knew and was familiar with. He made a trip to Los Angeles which could only be motivated by his desire to consummate the marriage. It has not been shown that there was any other reason for the trip.

These facts are again stated because here we have two diametrically opposed and conflicting stories relating to the consummation of the marriage. One is that of Fritsos, the other is that of the appellant. The officers of the Immigration and Naturalization Service considering the demeanor and motives of the parties, believed Fitsos and not the appellant. As stated by the lower Court:

> "Thus, there is ample support in the evidence for the conclusion that the petition had knowledge that she was, to say the least, not near the top of the quota list." [Tr. 32.]

The lower court goes on to say:

> "It is sufficient to say that from an examination of the whole record this Court is unable to say that there was not substantial evidence to support the conclusions of the Commissioner that the petitioner failed and refused to fulfill her promises made in connection with the marital agreement (*i.e.* the marriage) which was made to procure her entry as an immigrant."

Thus, there is substantial evidence in the record to support the finding that the appellant desired to come to Los Angeles to reside near her brother, that she married to gain entry and refused to fulfill her marital vows unless her husband met her demands and agreed to reside in

Los Angeles. The marriage was but a means to an end and the fraud practiced was not alone upon Fitsos but upon the Immigration authorities, a fraud traceable back to the inception of the marriage—a fraud perpetrated "solely to fraudulently expedite admission to the United States."

III.
The Deportation Hearings Were Fair.

Appellant contends that appellant's hearings were unfair because a State Department communication was placed in evidence without permitting appellant to see all of the communications of the State Department that might have had a bearing upon the same issue.

This is specious reasoning since any communication of the State Department showing the appellant's hopeless position upon the quota lists would negative appellant's statement that she was told that she would soon be "among the first" to come to the United States. Consular Officers are not known to hold out hope to an immigrant applicant when she is some 6000 down the list.

IV.
Credibility.

As stated by Judge Byrne in the case of *Acosta v. Landon,* 125 Fed. Supp. 434 at page 438:

> "Credibility of witnesses is ordinarily to be determined by the trier of facts, in this instance the inquiry officer. *Morikichi Suwa v. Carr,* Ninth Circuit 1937, 88 F. 2d 119. It is the inquiry officer in a deportation proceeding who is in a position to

observe the demeanor of witnesses, and his decision on the question of credibility should therefore rarely be disturbed."

Judge Byrne goes on to state in the same case and on the same page:

"Though this Court might have taken a different view of the testimony had the matter been before it *de novo,* it cannot be said that Chase's testimony was so improbable as to be unworthy of belief. Under such circumstances, this Court is obliged to accept the inquiry officer's findings."

Thus, in the case at bar, the lower court was obliged to accept the Inquiry Officer's findings, though the Court might have taken a different view were it trying the case. The witnesses are not before this Court and unless Fitsos' testimony were so improbable as to be unworthy of belief, this Court is obliged to accept the Inquiry Officer's findings.

V.
Scope of the Inquiry.

While the last section of this brief dealt with credibility, it ties in with the scope of the inquiry in a habeas corpus proceeding which is limited to a determination as to whether or not the proceedings were fair, if error of law was committed and if there is evidence of a substantial nature to support the findings of the Commissioner.

Eagles v. Samuels, 329 U. S. 304 and cases there cited.

The District Court found specifically on the points enumerated above within the scope of the inquiry and con-

cluded as a matter of law that the necessary conditions were met.

WHEREFORE, for the foregoing reasons, appellee requests that the judgment of the District Court be affirmed.

Respectfully submitted,

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APPENDIX.

Pages 3013 to 3016, Inclusive, of the Congressional Record—House, for Wednesday, March 17, 1937, Being Volume 81, No. 53.

[3013]

Deportation of Certain Aliens Who Fraudulently Marry Citizens of the United States.

Mr. Dickstein (when the Committee on Immigration and Naturalization was called). Mr. Speaker, by direction of the Committee on Immigration and Naturalization, I call up H. R. 28, to authorize the deportation of aliens who secured preference-quota or non-quota visas through fraud by contracting marriage solely to fraudulently expedite admission to the United States, and for other purposes.

The Clerk read the title of the bill.

Mr. Dickstein. Mr. Speaker, I ask unanimous consent that this bill may be considered in the House as in Committee of the Whole.

The Speaker. Is there objection?

There was no objection.

The Clerk read the bill, as follows:

Be it enacted, etc., That subdivision (f) of section 9 of the Immigration Act of 1924, as amended (43 Stat. 158; U. S. C., title 8, sec. 209, subdivision (f), is amended to read as follows:

"Sec. 9. (f) Nothing in this section shall be construed to entitle an immigrant, in respect of whom a petition under this section is granted, either to enter the United States as a nonquota immigrant if, upon arrival in the United States, he is found not to be a nonquota immigrant, or to enter the United States as a preference-quota immi-

grant if, upon arrival in the United States, he is found not to be a preference-quota immigrant."

Sec. 2. That subdivision (a) of section 13 of the Immigration Act of 1924, as amended (43 Stat. 161; U. S. C., title 8, sec. 213 (a)), is amended to read as follows:

"No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; (2) is of the nationality specified in the visa in the immigration visa; (3) is a non-quota immigrant if specified in the visa in the immigration visa as such; (4) is a preference-quota immigrant if specified in the visa in the immigration visa as such; and (5) is otherwise admissible under the immigration laws."

Sec. 3. That any alien who at any time after entering the United States is found to have secured either non-quota or preference-quota visa through fraud, by contracting a marriage which, subsequent to entry into the United States, has been judicially annulled retroactively to date of marriage, shall be taken into custody and deported pursuant to the provisions of section 14 of the immigration Act of 1924 on the ground that at time of entry he was not entitled to admission on the visa presented upon arrival in the United States. This section shall be effective whether entry was made before or after the enactment of this act.

Mr. Dickstein. Mr. Speaker, this bill comes from the committee unanimously. It has the endorsement of the Department.

This bill will simply add another section providing for deportation of any alien who contracts a marriage by fraud for the purpose of coming to the United States un-

der the quota. It is what is commonly known as the "gigolo" bill. We found a number of so-called aliens who could not possibly enter this country because of quota conditions, who have contracted a marriage which, in itself, was fraudulent, for the purpose of evading the immigration law. This bill has the highest recommendation from this committee for favorable action.

Mr. Jenkins of Ohio. Mr. Speaker, will the gentleman yield?

Mr. Dickstein. I yield.

Mr. Jenkins of Ohio. I wish the gentleman would explain how the bill would work, for his statement is rather general. Will he give us an illustration of how a person can get here through fraudulent marriage?

Mr. Dickstein. Let us take a country the quota of which is very small. A man in that country wishes to come into this country. He needs a preference status. If he marries an American citizen, an American woman, the woman honestly believing that he is sincere in this marriage, honestly believing that he is going to live with her as her husband, he is entitled to a preference. Because of the small quotas in these countries, people of those countries have in many instances entered into fraudulent marriage contracts with American citizens simply as a subterfuge to get into this country. When he gets into this country we immediately discover that he had absolutely no intention to live with this woman and did not intend to assume the contractual relationship of husband and wife..

Mr. Jenkins of Ohio. I am a little rusty on these changes in the law. As I understand it, an American male citizen may marry a foreign woman and bring her in as his wife, provided she is in good mental and physical

health and complies with the regulations for good character, and so forth.

Mr. Dickstein. She has to be in perfect health.

Mr. Jenkins of Ohio. But a woman cannot marry a man and bring him in, as I understand it, except that we did pass a law affecting such cases up to about the year 1928, and I think it has been moved up once since then to 1929. What is the limitation now beyond which the marriage does not admit a husband?

[3014]

Mr. Dickstein. Under the acts of 1924 and 1929, where a woman marries an alien, petitions the Department of Labor, proves that she is a citizen, and that she has married an alien, he is entitled to a preference under section 6 of the Immigration Act of 1924 and the amendments thereto. That preference more or less is a first preference.

Mr. Jenkins of Ohio. Does that apply to marriages even up to this date? What is the limitation?

Mr. Dickstein. The exemption ended in 1931.

Mr. Jenkins of Ohio. Let us follow that up a little further. If a woman has married a foreigner since 1931, she cannot bring him in just because he is her husband.

Mr. Dickstein. She cannot bring him in, but she can get him a first preference.

Mr. Jenkins of Ohio. She can make a request to the Department of Labor asking that her husband be put in the class that will be given first preference; but, because he gets in the first-preference class, that does not give her or anybody else the right to bring him in ahead of this class.

Mr. Dickstein. In the first-preference class are put mothers, fathers, wives, and husbands of American citizens.

Mr. Jenkins of Ohio. Let us just follow that up further. If that be the case, suppose an American woman marries a man in Czechoslovakia. If she makes application there that he be put in the first preference class he must be examined by our consular and immigration officers.

Mr. Dickstein. Absolutely. It goes further than that. He must first be examined by the medical officers of the Health Service and show that he is physically fit. He must be examined by the consul, and he must comply with all the laws pertaining to admission.

Mr. Jenkins of Ohio. Then if he passes all these examinations and comes here and it develops that he has not entered into the marital relationship as he should and it develops that he never intended to carry out the marriage contract, then he is put on the deportable list.

[Here the gavel fell.]

Mr. Jenkins of Ohio. Mr. Speaker, I move to strike out the last word in order to follow up the colloquy between the gentleman from New York and myself, which is proving so interesting to me.

Suppose this man is put in the first-preference class, he must come here before we can discover really that he has not or does not intend to carry out his marital agreement. When he gets here what is the next process?

Mr. Dickstein. If he gets into this country, first he must comply with all the requirements just like every other alien—he gets no benefits so far as the law is concerned; but then if he comes in here and the American wife has evidence to show that this man has perpetrated a fraud

upon her for the purpose of making her sign a petition to give him that preference, and he does not enter into and will not consummate any marriage that he contracted on the other side, all she would have to do under the pending bill would be to present this evidence to a court, and if the court decrees that the marriage was procured, obtained, or entered into by fraud, then the Department of Labor will have the right to deport him.

Mr. Jenkins of Ohio. I know that can be done, of course; but suppose this arrangement is made between these two people with criminal intent in the minds of both; in other words, this man simply buys his way into this country by inducing this woman to enter into this contract, what right have the people of this country, what right have the immigration officials when this man has come to this country and not carried out his arrangement, has not lived with this woman, is not her lawful husband, and takes no responsibility of a husband? What is our right under this bill?

Mr. Dickstein. There are other provisions of the 1917 law and the 1924 law to take care of people who actually commit a fraud upon the Government by signing a petition, because they are guilty of fraud in that instance.

Mr. Jenkins of Ohio. That is what I am coming to.

Mr. Dickstein. That has nothing to do with this bill.

Mr. Jenkins of Ohio. There ought to be some provision in that regard. It looks to me like the gentleman is simply playing into the hands of these people because the most trouble we have from what is trying to be cured here comes from men on the other side who buy their way into this country. They induce some woman to go through with this bogus marriage arrangement and never intend to carry it out. She is paid for it, and a woman

could bring a man into this country this month, another man next month, and so on, and could enter into the business of bringing men in. Under this bill she alone must raise the question. If she does not raise the question, we cannot do anything about it.

Mr. Dickstein. The gentleman is developing some other thought and consideration which deals with fraud. That has no bearing on this bill and is not within the scope of the intended legislation. From the examination which the Department has made and which the committee made, we do not find the condition to exist that the gentleman relates. I may say to the gentleman from Ohio, assuming a man and an American woman, or an American man or an American woman, entered into such a conspiracy, if it is for the purpose of evading the law they are guilty of perjury, and can be convicted and their citizenship canceled under the 1917 act and the 1929 act.

Mr. Jenkins of Ohio. Would the gentleman object to an amendment when we come to the proper place in the bill? Let us pass an amendment to the effect if and when she does file that petition and the petition is granted, then and at that time the man shall be immediately deportable.

Mr. Dickstein. Well, this provides for immediate deportation.

Mr. Jenkins of Ohio. Where does it provide for that?

Mr. Dickstein. The point is you cannot deport a man who has perpetrated a fraud on the other side with an American woman until that man gets into this country and the woman institutes proceedings and establishes fraud in a court of record.

Mr. Jenkins of Ohio. We have developed the situation to this point: I can see where the wife could take advantage of this situation. This would be a wonderful op-

portunity to do what the gentleman is trying to prevent. When she finds that this fellow will not carry out his agreement and that he has come into the country for this purpose, when the court has found such a condition to exist and grants a divorce, that fellow ought to be deportable. If she does not want him, and she brought him here, we do not want him either. Let us get rid of him.

[Here the gavel fell.]

Mr. Jenkins of Ohio. Mr. Speaker, I ask unanimous consent to proceed for 5 additional minutes.

The Speaker. Is there objection to the request of the genleman from Ohio?

There was no objection.

Mr. Jenkins of Ohio. Mr. Speaker, I want to develop the thought a little further. I think we can supply an amendment which will not hurt this bill but, on the contrary, will strengthen it a lot. We will find the place in this bill and insert just one simple amendment. I am not trying to delay the bill, I do not want to be put in the position of being against the bill, and I do not want to oppose it, but I think while we are at it we ought to put some teeth in these things. The women in these cases may not be to blame. Every time we have amended the law in this respect we have provided that a man may bring his wife in, but that the woman could not bring the husband in. Why? Because, in fact, we have said that the woman is the weaker of the two and is more susceptible to blandishments at the hands of man. It is thought that it would be pretty hard for a woman to induce a man to marry her for the purpose of assisting her to enter unlawfully, but it is easy for a man with a little money to come to this country on a visit, or acting through an emissary in this country to say to a woman: "You go

through this performance with me. It will all be perfunctory. Here is your thousand dollars and when I get there everything will be all right. I have paid you off."

[3015]

My amendment should provide, when she comes to that place that she finds he is not going to go ahead with the marriage, and the immigration officials find both of them have conspired and that the marriage has never been carried out, with the result that the immigration officials have been defrauded, they should have a right to put that man in the deportable class and send him out of the country.

Mr. Dickstein. I am willing to go as far as I can, but I want to call the gentleman's attention to the language of section 3 of the bill, which clearly states the processes—how the proceeding shall start and how it shall terminate. This language has been accepted by the Department of Labor and has been accepted by the members of the committee on both sides. The committee is simply trying to do its best to find a solution for a number of fraudulent marriages by "counts of no account," by so-called barons and a lot of highbrows, who come from little 2-by-1 countries and get into this country by subterfuge and fraud through marrying attractive American citizens. All we say in the bill is that, upon a decree of a court establishing this fraud, deportation is mandatory. Why does the gentleman want to change that?

Mr. Taylor of Tennessee. Mr. Speaker, a parliamentary inquiry.

The Speaker. The gentleman will state it.

Mr. Taylor of Tennessee. I am the ranking minority member of the committee, and, as I understand it, I have control of time on the minority side.

The Speaker. The Chair calls the attention of the gentleman to the fact that unanimous consent having been obtained by the gentleman from New York [Mr. Dickstein], we are considering this bill in the House as in the Committee of the Whole, and we are proceeding under the 5-minute rule; therefore, the gentleman cannot yield time. He may be recognized for 5 minutes and have his time extended by unanimous consent of the House.

Mr. Jenkins of Ohio. May I say I do not want to defeat the desire of the gentleman from Tennessee [Mr. Taylor] to get plenty of time, because we want to have plenty of time on this bill. There ought to be no hurry about it.

Mr. Speaker, I offer an amendment at the end of section 2 to this effect:

When such immigrant refuses to carry out his marital agreements, he shall then become immediately deportable after the approval of the Secretary of Labor.

Mr. Dickstein. Mr. Speaker, will the gentleman yield to me for a question?

Mr. Jenkins of Ohio. Yes; I yield to the gentleman.

Mr. Dickstein. Suppose the man had not perpetrated any fraud. Would not the method provided in this bill, that the wife must first apply to a court and establish that a fraud has been committed, be the safest way to provide for that?

Mr. Jenkins of Ohio. My purpose in offering this amendment is to put the amendment in the bill where the language is not perfect at all, so it will be a flag to the Senate when this bill gets over there which will give them to understand the purpose of the House is to clean this thing up. We want these people to understand that

this is an important matter, and if they practice fraud they should not profit by it.

[Here the gavel fell.]

Mr. Taylor of Tennessee. Mr. Speaker, this bill was reported out of the Committee on Immigration and Naturalization by a unanimous vote. I can find no objection to it insofar as it goes. It does not apply to bona-fide marriages which are made between nonquota immigrants and citizens of the United States. However, if it were determined after the marriage that the nonquota immigrant had in mind the perpetration of a fraud in order to obtain a visa to enter the United States, the court then would hold the marriage void from the beginning, and immediately and automatically, under section 3 of this act, such immigrant would become subject to deportation. This bill has no application whatever to bona-fide marriages contracted between foreigners and natives of this country.

Mr. Colmer. Mr. Speaker, will the gentleman yield?

Mr. Taylor of Tennessee. I yield.

Mr. Colmer. Is it not a fact the bill is in no sense a proposal to let down the bars, but is rather to restrict immigration?

Mr. Taylor of Tennessee. Absolutely so.

I do not think the amendment suggested by my colleague from Ohio would in any way help this legislation. I think, however, his amendment would seriously complicate the bill and probably render it invalid.

Mr. Dickstein. Mr. Speaker, will the gentleman yield?

Mr. Taylor of Tennessee. I yield.

Mr. Dickstein. If the gentleman from Ohio will let the bill go through without amendment, the committee

would be glad to collaborate with him on any amendment he thinks ought to be added, and we will present such amendment to the Senate committee considering the matter at the proper time.

Mr. Jenkins of Ohio. If the committee will permit this amendment, I think it will not hurt anything but will help.

Mr. Speaker, I offer an amendment, which I send to the desk.

The Clerk read as follows:

Amendment offered by Mr. Jenkins of Ohio: On page 3, after line 3, insert "When it appears that the immigrant fails and refuses to fulfill his promises for a marital agreement made to procure his entry as an immigrant, he then becomes immediately subject to deportation."

Mr. Jenkins of Ohio. Mr. Speaker, I think we have gone into this matter far enough. I am not saying this amendment is etymologically perfect, but it is the best I can do at this time. We must not waste time. If there are any corrections to be made on it, they can be made in the Senate.

The purpose of the amendment is to cover this situation:

If the woman enters into a fraudulent agreement to marry, she and the man are, of course, both fraudulently so contracting, and the man should be sent out as soon as the fraud is discovered. But if the woman enters into the agreement innocently, and then the man defrauds her, she can resort to the courts of this country to have herself freed. When this has been done, the man ought not to be allowed to walk the streets of this great country, but should be deported.

Mr. May. Mr. Speaker, may I suggest a modification of the gentleman's amendment? Where he says "fails

and refuses," I suggest the word "or" be substituted for "and."

Mr. Jenkins of Ohio. That is a good suggestion. I accept it. "Fails or refuses."

Mr. Dickstein. Mr. Speaker, I rise in opposition to the amendment.

Some Members of the House have charged a number of times that I am not bringing out restrictive legislation. Far be it from that. I have always tried to bring about restriction where restriction was necessary. I think this is one of the bills we should pass in its present form.

I call your attention to the language of section 3:

That any alien who at any time after entering the United States is found to have secured either non-quota or preference-quota visa through fraud, by contracting a marriage which, subsequent to entry into the United States, has been judicially annulled retroactively to date of marriage, shall be * * * deported.

I believe the language is proper as it is. I have no objection to accepting the gentleman's amendment, but may I say to the gentlemen who believe in this kind of a restriction, I hope the gentleman will withdraw his amendment and let the language stay as it is, in its proper place and in its proper form, as approved by the Department. If the gentleman insists upon the amendment, I shall offer no objection to it, but I am afraid it will hurt the bill. If the gentleman believes such frauds as this should be restricted, I think for the sake of this legislation he should withdraw his amendment.

Mr. Colmer. Mr. Speaker, I move to strike out the last word.

Mr. Speaker, I am in sympathy with the thoughts which impel the gentleman from Ohio to offer this amendment.

[3016]

As a member of this commitee, it is largely my purpose, as it is the purpose of the gentleman from Ohio, to try to restrict the immigration laws rather than to loosen them. However, I am afraid the gentleman in offering his amendment has in the short time he has had to study the bill misconstrued the purpose of it. I am afraid his motives have outweighed his judgment in the brief opportunity he has had to consider the bill.

Section 3 of the bill does exactly what the gentleman has in mind, but the language which he has offered in his amendment is contrary to section 3 and is inconsistent therewith. Therefore, I hope the amendment may be withdrawn, or that, if not withdrawn, it may be voted down.

Mr. Starnes. Mr. Speaker, will the gentleman yield for a question?

Mr. Colmer. I yield to the gentleman from Alabama.

Mr. Starnes. I think the purpose of the gentleman from Ohio [Mr. Jenkins] is to safeguard fraudulent entries without waiting for an annulment by the courts; in other words, it would be possible for a couple to enter into a fraudulent conspiracy, and the man or woman who has secured entrance into this country in such manner could not be deported until there had been a judicial annulment of the marriage.

Mr. Colmer. I may say to the gentleman that I did not so construe the amendment.

Mr. Dies. Mr. Speaker, will the gentleman yield?

Mr. Colmer. I yield?

Mr. Dies. Is it not a fact that under existing law, where there is a conspiracy, the alien is deportable now?

Mr. Dickstein. That is what I have stated.

Mr. Dies. And under your bill you require a judicial determination of the question of fraud before he is deportable.

Mr. Dickstein. Insofar as marriage is concerned.

Mr. Dies. Will simply a divorce decree make him deportable or does the court affirmatively have to find fraud?

Mr. Dickstein. The action itself is based upon fraud.

Mr. Dies. But is a mere decree of divorce sufficient?

Mr. Dickstein. Any decree of divorce based on fraud will automatically take such alien and send him back to his native land.

Mr. Jenkins of Ohio. Mr. Speaker, I rise in opposition to the pro forma amendment.

Mr. Speaker, I think this amendment should be adopted and I am pleased that the gentleman from New York [Mr. Dickstein] has indicated he has no serious opposition to it, because we are both trying to do the same thing. Let us allow the amendment to go through, and, if we find that the language is inconsistent, when it gets over to the Senate we can correct it.

The immigration laws of our country are very complex. There is no question about that, and I defy anyone, no matter how expert he may be on immigration law, to take one of these bills or the pending bill and be able to state just how an amendment would apply, because of the complexity of the laws. This bill refers to section after section, and to know how these will intermesh with each other when new legislation is proposed is more than anyone can tell without

a chance to study them carefully. This is what my amendment does. It simply provides that whenever any alien is permitted to enter this country upon certain respresentations as to his present or intended marital relationships, and later it is discovered that he has made misrepresentations, he is then subject to deportation. Why should he not be deported? To whom does he make such misrepresentations? He makes them to the American officials in a foreign country. He deceives our own immigration officials there and as soon as they find he has deceived them or has practiced deceit, why should they not have the authority to say to him, "You have deceived us, you have lied to us, and now you are in the deportable class and we are going to send you back." What is the use of waiting for a court decree? As soon as they find out he has misrepresented basic and cardinal facts in the statement which he has to file, what is the use of temporizing with him? Let us say to him that he cannot act in that way with us, and that we will put him in the deportable class, and when his time comes we will send him back to the country from which he came.

Mr. Dies. Mr. Speaker, will the gentleman yield?

Mr. Jenkins of Ohio. I yield.

Mr. Dies. Under existing law, in the case of any marriage that is fraudulent, where both parties participated in the fraud, such action makes the alien deportable. As I understand the intention of the gentleman who introduced this bill, it is to make it a deportable offense where only one party is guilty of fraud. What I am wondering about is whether or not, under the language of the bill, the gentleman accomplishes what he has in mind.

Mr. Jenkins of Ohio. I hope I do. I have done the best I can on the spur of the moment; and in any event,

this will be a flag to the Senate and the Senate will understand what this House wants done. We give these people a great privilege when we offer them a chance to become American citizens. They cannot trifle with this priceless privilege. Whosoever does cannot complain if his conduct brings down upon his head a withdrawal of the privilege.

Mr. Englebright. Mr. Speaker, I move to strike out the last two words.

I do this, Mr. Speaker, for the purpose of asking the chairman of the Committee a question, if he cares to enlighten me.

Does this bill cover the situation where a nonquota immigrant or a quota immigrant who might be in this county on a visitor's permit and contracts a marriage with an American woman, who afterward would make application for him to remain or stay in the county?

Mr. Dickstein. It would work both ways. What we were talking about was an alien who marries an American citizen and comes over here to America. The gentleman is now talking about an alien who would come into this country and contract a marriage by fraud.

Mr. Englebright. Exactly.

Mr. Dickstein. This does not permit him to stay in this country. He has to go back and the woman would have to bring him back again. She would have to file a petition with the Department of Labor setting forth the facts and he would have to comply with the immigration law. If a man contracted a marriage in this country or abroad only for the purpose to evade the immigration law, he would be subject to deportation.

The pro-forma amendments were withdrawn.

The Speaker. The question is on the amendment offered by the gentleman from Ohio.

The question was taken; and there were on a division (demanded by Mr. Jenkins of Ohio)—ayes 58, noes 49.

So the amendment was agreed to.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

No. 14422

United States
Court of Appeals
for the Ninth Circuit

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, Appellants,

vs.

FABRI-VALVE COMPANY OF AMERICA, a Corporation, Appellee.

FABRI-VALVE COMPANY OF AMERICA, a Corporation, Appellant,

vs.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, Appellees.

Transcript of Record

Appeals from the United States District Court for the District of Oregon

Philips & Van Orden Co., 870 Brannan Street, San Francisco, California—8-25-54.

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In the District Court of the United States for the District of Oregon

Civil Action No. 5783

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, Plaintiffs,

vs.

FABRI-VALVE COMPANY OF AMERICA, a Corporation, Defendant.

COMPLAINT FOR INFRINGEMENT OF UNITED STATES LETTERS PATENT No. 2,001,271

Bill of Complaint

Plaintiffs complain of the defendant, and for cause of action against the defendant, allege:

I.

The plaintiff, the United States National Bank of Portland, Oregon, is a national banking association, with its principal office and place of business in the city of Portland, county of Multnomah, and State of Oregon.

II.

The plaintiff, Walter G. E. Smith, is a citizen and resident of Longbranch, county of Pierce, State of Washington.

III.

The defendant, Fabri-Valve Company of America, is a corporation organized and existing under and by virtue of the laws of the State of Oregon,

and has a regular and established place of business in the city of Portland, county of Multnomah, and State of Oregon.

IV.

That the jurisdiction of this Court is based upon the patent laws of the United States of America.

That the acts of infringement hereinafter complained of were and are being committed by the defendant in the city of Portland, county of Multnomah, State of Oregon, within this District and elsewhere in the United States.

V.

That on December 3, 1930, Walter G. E. Smith, being, within the meaning of the statutes of the United States then in force, the first, original and sole inventor of a certain new, useful and patentable improvement in gate valve, and being entitled to receive Letters Patent therefor under the provisions of said statutes, duly filed in the United States Patent Office an application for Letters Patent, Serial No. 499,709, for said invention.

That on May 14, 1935, the said Walter G. E. Smith having complied with all of the requirements of the then existing statutes of the United States and Rules of Practice of the United States Patent Office relating to the grant of Letters Patent for an invention, Letters Patent of the United States No. 2,001,271 were duly granted to the said Walter G. E. Smith on said application Serial No. 499,709, which Letters Patent, or a copy thereof, the plaintiffs will produce as this Court may direct.

VI.

That on the 17th day of December, 1935, the said Walter G. E. Smith assigned to Sue Olive Smith, as Trustee, the entire right, title and interest in and to said Letters Patent No. 2,001,271, which assignments were received by the said Sue Olive Smith and acknowledged by her to be for the benefit of Patricia Ann Smith and Virginia Hedwig Smith, infant daughters of the said Walter G. E. Smith and Sue Olive Smith.

VII.

That thereafter, the said Sue Olive Smith, Trustee, died, and the Circuit Court of the State of Oregon for the County of Multnomah, upon a petition of Walter G. E. Smith, on the 25th day of May, 1937, considered, ordered, adjudged and decreed that the United States National Bank of Portland, Oregon be substituted and appointed trustee of said trust in the place and stead of the said Sue Olive Smith, deceased.

That the entire right, title and interest in and to the above referred to United States Letters Patent No. 2,001,271 has, ever since the 25th day of May, 1937, been vested in the United States National Bank of Portland, Oregon, as trustee.

VIII.

That defendant has, subsequent to the date of said Letters Patent and prior to the filing of this Bill of Complaint, infringed the said Letters Pat-

ent, and threatens to continue to so infringe, by making or causing to be made, selling or causing to be sold, and using or causing to be used, within this District and elsewhere in the United States, gate valves made in accordance with and embodying the inventions disclosed, described and claimed in plaintiff's aforesaid Letters Patent No. 2,001,271.

That all of the aforesaid acts were committed by said defendant wilfully and without consent of the plaintiffs.

IX.

That plaintiffs have placed the required statutory notice on all gate valves manufactured and sold by them or by their licensees under said Letters Patent, and have given notice in writing to said defendant.

Wherefore, plaintiff prays:

1. That defendant, its officers, agents, servants and employees be enjoined, during the pendency of this action and permanently, from directly or indirectly making or causing to be made, selling or causing to be sold, or using or causing to be used gate valves made in accordance with or embodying the inventions of Letters Patent No. 2,001,271;

2. That defendant be required to account to plaintiffs for profits and damages occasioned by reason of defendant's infringement of said Letters Patent;

3. That defendant be required to pay the costs of this action, including reasonable attorneys fees as may be allowed to plaintiffs by the Court; and

4. That plaintiffs have such other and further relief as the Court may deem meet and just.

THE UNITED STATES NATIONAL BANK OF PORTLAND (Oregon)
By COOK AND SCHERMERHORN,
/s/ HAROLD D. COOK,
Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed October 11, 1950.

[Title of District Court and Cause.]

ANSWER

First Defense

Answering the complaint herein:

I.

Defendant admits the allegations of paragraphs I, II and III thereof.

II.

As to paragraph IV, defendant admits the jurisdiction of this Court and denies each and every other allegation in said paragraph IV contained.

III.

As to paragraph V, defendant admits that on or about December 3, 1930, Walter G. E. Smith filed in the United States Patent Office an application for Letters Patent, Serial No. 499,709, and that on May 14, 1935, Letters Patent of the United States,

No. 2,001,271, were granted to the said Smith on the said application; denies each and every other allegation in said paragraph V contained.

IV.

Admits paragraph VI and VII and denies each and every allegation in paragraphs VIII and IX of said complaint.

Wherefore, defendant prays that plaintiffs be denied relief herein and recover naught, that said complaint be dismissed, that plaintiffs be required to pay the costs of this action, including defendant's reasonable attorney's fees to be allowed by the court and that defendant have such other and further relief as the Court may deem meet and just.

FABRI-VALVE COMPANY OF AMERICA, Defendant

/s/ By W. B. SHIVELY,
Attorney for Defendant

Duly Verified.

Receipt of copy attached.

[Endorsed]: Filed November 6, 1950.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled case came on regularly for pretrial conference before the undersigned Judge of the above entitled court on Monday, February 19, 1951, plaintiff Walter G. E. Smith appearing in person and plaintiffs appearing by Harold L.

Cook and Arthur S. Vosburg, and defendant appearing by W. B. Shively and Elmer A. Buckhorn, the parties, with the approval of the court, agreed upon the following

Statement of Facts

I.

That plaintiff, the United States National Bank of Portland, Oregon, is a national banking association with is principal office and place of business in the City of Portland, County of Multnomah, State of Oregon.

II.

That plaintiff, Walter G. E. Smith, is a citizen and resident of Longbranch, County of Pierce, State of Washington.

III.

That defendant Fabri-Valve Company of America is a corporation organized and existing under and by virtue of the laws of the State of Oregon with a regular and established place of business in the City of Portland, County of Multnomah, State of Oregon.

IV.

That the jurisdiction of this court is based upon the patent laws of the United States of America.

V.

That on December 3, 1930, Walter G. E. Smith filed in the United States Patent Office an application for Letters Patent, Serial No. 499,709, and that on May 14, 1935, Letters Patent of the United

States, No. 2,001,271, were duly granted to the said Walter G. E. Smith on said application, Serial No. 499,709.

VI.

That on the 17th day of December, 1935, said Walter G. E. Smith assigned to Sue Olive Smith, as trustee, the entire right, title and interest in and to said Letters Patent No. 2,001,271, which assignment was received by the said Sue Olive Smith and acknowledged by her to be for the benefit of Patricia Ann Smith and Virginia Hedwig Smith, then infant daughters of said Walter G. E. Smith and Sue Olive Smith.

VII.

That subsequent to the 17th day of December, 1935, Sue Olive Smith, trustee, died, and the Circuit Court of the State of Oregon for the County of Multnomah, upon petition of Walter G. E. Smith, on the 25th day of May, 1937, considered, ordered, adjudged, and decreed that The United States National Bank of Portland, Oregon, be substituted and appointed trustee of said trust in the place and stead of said Sue Olive Smith, deceased; that the entire right, title and interest in and to the above referred to United States Letters Patent No. 2,001,271 has ever since the 25th day of May, 1937 been vested in plaintiff, The United States National Bank of Portland, Oregon, as trustee.

VIII.

That on April 13, 1950, plaintiffs, by their attorneys, notified defendant in writing that valves

manufactured and sold by Fabri-Valve Company of America infringe Letters Patent No. 2,001,271, to Walter G. E. Smith, for Gate Valve. Said written notice was sent to defendant, Fabri-Valve Company of America, by registered mail and acknowledged to have been received by it on April 14, 1950. Said notice called upon defendant to immediately desist from the further manufacture and sale of valves in infringement of said Letters Patent, and to account for profits derived from the sale of the infringing item and for damages suffered by plaintiff.

Plaintiffs' Contentions

I.

That on December 3, 1930, Walter G. E. Smith, being, within the meaning of the statutes of the United States then in force, the first, original and sole inventor of a certain new, useful and patentable improvement in gate valve, and being entitled to receive United States Letter Patent therefor under the provisions of said statutes, duly filed in the United States Patent Office an application for Letters Patent, Serial No. 499,709, for said invention. That on May 14, 1935, the said Walter G. E. Smith having complied with all the requirements of the existing statutes of the United States and the Rules of Practice of the United States Patent Office relating to the grant of Letters Patent for an invention, was duly granted Letters Patent of the United States No. 2,001,271 on said application; that defendant, subsequent to the 14th day of May, 1935, and prior to and within six years of the date

of filing of complaint herein, has infringed claims 1, 2, 3, 5 and 6 of the said Letters Patent No. 2,001,271, and threatens to continue to so infringe, by making or causing to be made, selling or causing to be sold, and using or causing to be used, in the City of Portland, County of Multnomah, State of Oregon, within this district, and elsewhere in the United States, gate valves made in accordance with and embodying the inventions disclosed, described and claimed in the plaintiff's aforesaid patent No. 2,001,271; that all of the aforesaid acts were committed by said defendant willfully and without the consent of the plaintiffs; that plaintiffs have placed the required statutory notice on all gate valves manufactured and sold by them or by their licensees under said Letters Patent and have given notice in writing to said defendant.

Defendant's Contentions

I.

That the defendant has never infringed the plaintiff's patent in suit.

II.

That the gate valves manufactured and sold by defendant since the issuance of the patent in suit do not infringe any of the claims of the patent in suit.

III.

That all of the claims of the patent in suit must be strictly construed as clearly evidenced by the file history of the application for the patent in suit.

IV.

That the plaintiffs and/or their licensees have not placed the required statutory notice on all gate valves manufactured and sold by them or by their licensees under said Letters Patent.

Issues To Be Determined

I.

Has defendant, subsequent to the 14th day of May, 1935, the date of granting Letters Patent of the United States No. 2,001,271, to plaintiff Walter G. E. Smith, and within six years prior to the date of filing of this complaint, infringed the said Letters Patent No. 2,001,271, and more particularly claims 1, 2, 3, 5 and 6 thereof, by making or causing to be made, selling or causing to be sold, or using or causing to be used in the City of Portland, County of Multnomah, State of Oregon, or elsewhere in the United States, gate valves made in accordance with and embodying the inventions disclosed, described and claimed in said Letters Patent No. 2,001,271 as exemplified by plaintiff's exhibits 3, 4 and 9 and defendant's exhibits F, G, H, J and K?

II.

Should defendant, its officers, agents, servants and employees, be permanently enjoined from directly or indirectly making or causing to be made, selling or causing to be sold, or using or causing to be used, gate valves embodying and employing the inventions described and claimed in said Letters Patent No. 2,001,271, as exemplified by plaintiffs'

Exhibits 3, 4 and 9, and defendant's Exhibits F, G, H, J and K.

III.

Should the defendant be made to account to plaintiff for profits and damages?

IV.

Should costs and attorney fees be allowed to either the plaintiff or defendant?

Stipulation

It is stipulated and agreed by and between counsel for the respective parties, the Honorable James Alger Fee concurring, that the question of whether or not plaintiffs and/or their licensees have placed the required statutory notice on all gate valves manufactured and sold by them under said Letters Patent shall be resolved at the time of the accounting; and that plaintiffs shall have until the time of said accounting within which to take depositions regarding said matter.

Plaintiffs' Exhibits

1. U. S. Letters Patent No. 2,001,271.

2. Blue prints (.. sheets) of improved 14" gate valve manufactured and sold by licensees under U. S. Letters Patent No. 2,001,271.

3. Blue prints (4 sheets) of 14" gate valve manufactured and sold by defendant Fabri-Valve Company of America.

4. Two sheets drawings on Bristol board of 4"

gate valve No. 1063 manufactured and sold by defendant, Fabri-Valve Company of America.

5. Aluminum model of gate valve manufactured and sold by licensees under U. S. Letters Patent No. 2,001,271.

6. Reserved for plastic and wood model of gate valve manufactured and sold by licensees under U. S. Letters Patent No. 2,001,271.

7. Reserved for plastic and wood model of gate valve manufactured and sold by defendant Fabri-Valve Company of America.

8. Reserved for actual sample valve manufactured and sold by licensees under U. S. Letters Patent No. 2,001,271.

9. Reserved for actual sample valve No. 1063 manufactured and sold by defendant Fabri-Valve Company of America.

10. Sample of bleached pulp.

11. Catalogue issued by defendant Fabri-Valve Company of America.

12. Agreement, dated December 4, 1945, between Walter G. E. Smith and Western Machinery Corporation, an Oregon corporation, and assignment to United States National Bank of Portland, Oregon.

13. Agreement dated August 9, 1939, between the United States National Bank of Portland, Oregon, and Crane Co.

14. Agreement dated May 13, 1938, between the United States National Bank of Portland, Oregon, and Crane Limited.

15. Records showing sales of gate valves by Western Machinery Corp., licensee under U. S.

Letters Patent No. 2,001,271 for period from January 1, 1946 to December 1, 1947.

16. Records showing sales of gate valves by Western Machinery Corp., licensee under U. S. Letters Patent No. 2,001,271 for period from December 1, 1947 to July 1, 1949.

17. Records showing sales of gate valves by Western Machinery Corp., licensee under U. S. Letters Patent No. 2,001,271 for period from July 1, 1949 to January 1, 1951.

18. Records showing sales of gate valves by Crane Co., licensee under U. S. Letters Patent No. 2,001,271 in the United States from October 1, 1946 to October 1, 1949.

19. Records showing sales of gate valves by Crane Co., licensee under U. S. Letters Patent No. 2,001,271 in the United States from October 1, 1949 to January 1, 1951.

20. Reserved for deposition of officer or employee of Crane Company that the required statutory notice has been placed on all gate valves manufactured and sold by it under the patent in suit.

21. Copy of advertisement appearing on page 109 of Vol. LVII, No. 11, of the magazine "Time" by Crane Co.

Defendant's Exhibits

A. Certified copy of file wrapper and contents of the United States Letters Patent in suit No. 2,001,271.

B. Copies of reference patents cited in file wrapper of United States Letters Patent No. 2,001,271, as follows:

B1—United States Patent No. 109,001—Glass.
B2—United States Patent No. 1,613,509—Gill.
B3—United States Patent No. 259,658—Atcheson.
B4—United States Patent No.—988,777—Hedrich.
B5—United States Patent No. 1,753,524—Mawby.
B6—United States Patent No. 1,065,494—Anderson.
B7—United States Patent No. 1,536,874—Bates.
B8—United States Patent No. 1,379,136—Summers, et al.
C. Copies of patents showing prior art:
C1—United States Patent No. 105,027—Belfield.
C2—United States Patent No. 127,768—Hewes.
C3—United States Patent No. 233,180—Allt.
C4—United States Patent No. 286,656—Van Wie.
C5—United States Patent No. 494,579—Lunken.
C6—United States Patent No. 494,581—Lunkenheimer.
C7—United States Patent No. 494,582—Lunkenheimer.
C8—United States Patent No. 985,444—Patterson.
C9—United States Patent No. 1,179,047—Snow.
C10—United States Patent No. 1,483,041—Brooks.
C11—United States Patent No. 1,751,122—Barker.
C12—German Patent No. 17,094 (1882)—Heinecke.
C12t—Translation of specification of German Patent No. 17,094 Heinecke.

D. Reserved for chart showing valves of Smith patent, Defendant, and prior art patents.

E. Catalogue of Smith Valve Company.

F. Photographs (F1, F2, F3) showing gate valve as manufactured by defendant, Fabri-Valve Company of America.

G. Blue print showing gate valve as manufactured by defendant, Fabri-Valve Company of America, Group 301 3" Bonnet Stock Valve.

H. Reserved for actual sample of valve shown in blue print (G).

I. Reserved for wood model of valve shown in German Patent No. 17,094 Heinecke.

J. Reserved for actual sample of bonnetless type, split casing, flared inlet port stock valve.

K. Reserved for blue prints (4 sheets) of 14" gate valve manufactured and sold by Fabri-Valve Co.

L. Reserved for catalogue issued by Fabri-Valve Co.

M. United States Patent No. 2,000,853—Lange.

The parties hereto agree to the foregoing pretrial order and the court being fully advised in the premises;

Now Orders that the foregoing pretrial order shall not be amended except by consent of both parties or to prevent manifest injustice, and that said pretrial order supersedes all pleadings; and

It Is Further Ordered that upon the trial of this case no proof shall be required as to matters of fact hereinabove specifically found to be admitted but

that proof upon the issues of fact and law by the plaintiff and the defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 28th day of March, 1951.

/s/ GUS J. SOLOMON,
United States District Judge

Approved:

/s/ HAROLD D. COOK,
Attorneys for Plaintiffs
/s/ E. A. BUCKHORN,
Attorneys for Defendant

[Endorsed]: Filed March 28, 1951.

[Title of District Court and Cause.]

ORAL OPINION
December 31, 1952

Neither in the pretrial order nor in the briefs by either plaintiff or defendant was the issue of validity of the Smith patent raised. Defendant, in its opening brief, stated, "The single issue involved is whether or not any or all of the claims 1, 2, 3, 5 and 6 of the Smith patent are infringed by either or both of the valves, type A or type B, as manufactured by the defendant."

Validity having been conceded or at least assumed by the defendant, I shall, for the purposes of this case, make the same assumption and confine my

remarks to the question of infringement. Royal Typewriter Co. vs. Remington Rand, 168 F.2d 691.

Defendant contends that the file wrapper of the Smith patent, as well as the prior art patents introduced in evidence by the defendant, show that the Smith patent was a very narrow one covering a minor improvement in a highly developed art. He also contends that Smith, in the prosecution of his patent before the Patent Office, abandoned broad claims which had been rejected and, in order to obtain a patent, substituted narrower claims containing express limitations. He therefore contends that the doctrine of equivalency may not be invoked to avoid the express limitations contained in the claims as granted.

I find that Claims 1, 2, 5 and 6 all provide for cavities at the bottom of the side wall on the inlet side. Examination of the drawings and the original description reveals that the word "cavities" is not synonymous with the words "recess in the floor of said housing" which is designated by the letter "j". The cavities, although not defined in the description, are referred to in the drawing by the letter, "m".

The accused machines have recesses but do not have cavities and I therefore find that claims 1, 2, 5 and 6 have not been infringed.

Claim 3 does not provide for cavities but it does provide for the "lower end of said opening formed V shape."

The defendant contends that the presence of the V shape in the accused machines is essential in order to constitute infringement because of a file wrapper estoppel which precludes plaintiff from relying on the doctrine of equivalents.

In my opinion, the arguments of the lawyer for the patentee in connection with original Claims 6, 7 and 8 and his attempt to distinguish Gill and Hedrick do not constitute file wrapper estoppel.

The difference between "V" and "U" is so small that, even though plaintiff is entitled to the narrowest range of equivalents, a "U" shaped opening should be declared to be the equivalent of a "V" shaped opening particularly in view of the fact that the accused machines with the "U" shape attain substantially the same result in substantially the same way. Historically, the letter "U" and the letter "V" were used interchangeably and, according to Webster's New International Dictionary, "In dictionaries of English, capital U and V were not given separate alphabetical positions until about 1800." Even today, on inscriptions on public buildings and elsewhere, we often see the letter "V" used as a "U". In my opinion, therefore, the accused machines infringe Claim 3 of the Smith patent.

I suggest a conference on Monday, January 12, at 11 a.m. to consider the other issues in the case.

[Title of District Court and Cause.]

ORAL OPINION

June 17, 1953

I have heretofore held that the defendant's gate valves do not infringe claims 1, 2, 5 and 6 of the Smith patent, but do infringe claim 3. In making this determination, I assumed validity because the patent had expired and because neither the answer nor the pretrial order raised that question.

Plaintiffs do not, and for some years have not, manufactured gate valves covered by the Smith patent. Instead, in 1938 and 1939, they entered into licensing agreements with the American and Canadian Crane Companies for the manufacture, sale and distribution of such valves, except in ten named western states, on a 5% royalty basis.

In 1945, plaintiffs licensed the Western Machinery Co. for the territory not covered by the Crane licenses. The licensee agreed to pay a 12½% royalty but, as part of such contract, plaintiffs furnished it with drawings, specifications and patterns.

Plaintiffs' evidence on damages was limited to the introduction in evidence of these contracts and a statement furnished by the defendant of the number and total dollar volume of the sale of the various types of gate valves manufactured by defendant which plaintiffs contended infringed the Smith patent.

The defendant's valves are not Chinese copies of

the patented structure. They do not have the cavities which are an essential element in the claims which I found were not infringed.

Claim 3 does not provide for cavities. However, it does call for the "lower end of said opening formed V-shape." Although the V-shape was the preferred embodiment of this structure and although the file wrapper shows that emphasis was placed upon such shape, I found that the U-shape or round opening obtained substantially the same result in substantially the same way and that plaintiffs, even though entitled to a very narrow range of equivalents, were entitled to claim that the patented structure included a U-shape as well as a V-shape opening.

There was no evidence of the impact of the manufacture and sale by the defendant on the patented structure and no expert testimony on what would be a reasonable royalty for the accused valves.

The statute relative to damages (Title 35 USCA 283) requires "upon finding for the claimant, the court shall award the claimant damages adequate to compensate for the infringement but in no event less than the reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court."

Ordinarily the court would consider other contracts entered into by the claimant as a proper standard upon which to determine a reasonable royalty. In this case, however, in view of the facts hereinbefore set forth and the fact that the patented structure represented only a minor improve-

ment in a highly developed art, I find that a reasonable royalty is 1½% of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950, and May 14, 1952, which, according to my calculations, amounts to $2,962.16.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Rules of Civil Procedure, this cause having come on for trial before this Court on March 28, 1951, before the Honorable Gus J. Solomon, District Judge, and plaintiffs and defendant having presented their evidence and having presented briefs in support of their respective contentions, and the matter having been further argued before this Court on January 26, 1953, and this Court having directed plaintiffs to prepare Findings of Fact and Conclusions of Law, the same are hereby adopted by the Court as its Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Rules of Civil Procedure:

Findings of Fact

I.

This is a civil action for patent infringement in which The United States National Bank of Portland, Oregon, Trustee, a national banking associa-

tion with its principal office and place of business in the City of Portland, State of Oregon, and Walter G. E. Smith, the inventor of the patent in suit, are plaintiffs and Fabri-Valve Company of America, an Oregon corporation, having its office and place of business in the City of Portland, State of Oregon, is defendant and is charged with infringement of United States Letters Patent No. 2,001,271, issued May 14, 1935, to Walter G. E. Smith.

II.

On December 3, 1930, Walter G. E. Smith filed in the United States Patent Office an application for Letters Patent, Serial No. 499,709, for an improvement in gate valve, and on May 14, 1935, Letters Patent No. 2,001,271 was granted to the said Walter G. E. Smith for said invention.

III.

Plaintiff, United States National Bank of Portland, Oregon, is the owner, by mesne assignment, of the entire right, title and interest in and to the patent in suit and of the sole right to recover for all infringements thereof.

IV.

On April 13, 1950, plaintiffs, by their attorneys, notified defendant in writing that valves manufactured and sold by Fabri-Valve Company of America infringe Letters Patent No. 2,001,271, to Walter G. E. Smith, for Gate Valve. Said written notice was sent to defendant, Fabri-Valve Company of

America, by registered mail, and acknowledged to have been received by it on April 14, 1950.

V.

The gate valve disclosed in the patent in suit, as well as the gate valves manufactured by the defendant and charged to be an infringement of the patent, are designed particularly for use in pulp mills and more particularly for controlling the flow of pulp stock through pipelines. The valves consist essentially of a valve body having inlet and outlet ports, the side walls of the valve body being provided with passageways for slidably receiving a gate movable in a direction at right angles to the direction of fluid flow through the ports.

VI.

The gate valve as disclosed in the patent in suit is provided with a rectangular gate, the opposite side edges of which are arranged for sliding movement within cooperating parallel grooves formed in opposite side walls of the valve body in the central portion thereof. The square lower end of the gate is provided with a beveled or knife edge which slides against a transverse wall provided on the face of the outlet section of the valve body. An opening is formed in this traverse wall and is V-shaped at the lower end thereof as illustrated more clearly in the right-hand view of Figure 5 of the patent drawings and the transverse wall is defined in part by the portions 1′. The gate in being moved to the closed position is supported at its lower end by the trans-

verse wall portions marked 1′ against the thrust of the pressure of the inlet fluid. Moreover, the knife edge provided at the lower end of the rectangular gate scrapes away any pulp stock or other material which may collect on the face of the wall and prevents such material from interfering with the operation of the gate. Cavities marked by the reference characters m are provided in the opposite side walls of the valve body on the inlet side of the gate and communicate with the lower ends of the gate grooves for receiving material which will be forced downwardly in the grooves as the gate is moved to the closed position.

VII.

Two different types of valves manufactured by defendant are complained of. The first valve, which has been referred to as Type A, shown in defendant's Exhibit D, Plate 2, is provided with a cylindrical body and both the inlet and outlet ports are of circular shape. The gate plate which is mounted for sliding movement in cooperating passageways provided in the valve body is semicircularly curved at the bottom. The semicircular lower end of the gate plate is beveled for the purpose of scraping accumulated pulp stock from the face of the seating ledge provided for the gate.

VIII.

The second of defendant's valves, which has been designated as the Type B valve, is illustrated in defendant's Exhibit D, plate 3. This valve differs from the Type A valve in that it is of the bonnetless type

whereas the Type A is of the bonnet type, and instead of having a one-piece housing, as in the case of the Type A valve, the Type B valve includes a two-part housing. The two parts are bolted together with an intermediate spacer so as to provide passageways in the opposite side walls for cooperatively receiving a vertically slidable gate plate, the lower end of which is semicircularly curved and provided with a beveled edge. As in the case of the Type A valve, the outlet port of this valve is of circular form.

IX.

Defendant's valves are provided with a seating ledge extending around the full circle of the valve housing, which seating ledge forms the outlet side of the groove in which the gate slides and which supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed. The wall of the groove on the inlet side is cut away across the floor of the valve housing so that any pulp stock which accumulates in the groove and which is moved out of the groove by the descending gate and onto the floor of the housing will be carried away by the flow of material through the valve when the gate is opened.

X.

In defendant's gate valve bonnet Type A, as exemplified by defendant's Exhibit No. D—Plate 2, defendant uses a metal ring welded to and extending around the full circle of the valve housing and providing the outlet side of the guide groove and

the seating ledge for the gate. In defendant's gate valve bonnetless Type B, as exemplified in defendant's Exhibit No. D—Plate 3, the inside diameter of the outlet port is less than the inside diameter of the inlet port, and the end face of the outlet port forms the outlet side of the guide groove and the seating ledge for the gate.

XI.

Gate valves were highly developed by the prior art more than one year prior to the filing of the application which matured into the Smith patent in suit. The defendant's valves are not exact copies of the patented structure. With reference to claims 1, 2, 5 and 6 of the patent in suit, it is noted that these are all specifically limited to a gate valve structure in which the side walls of the valve body on the inlet side of the gate are provided with cavities communicating with the bottom of the gate passageways or grooves. Such cavities are provided for the express purpose of receiving pulp material which may accumulate in the gate grooves during the opened condition of the gate, which accumulation will be forced downwardly into the cavities as the gate is moved toward the closed position. Such cavities are shown in the drawings of the Smith patent, Figures 1, 3 and 5, and are marked by the reference character m. Such cavities are essential elements in the claims 1, 2, 5 and 6 and since they are not present in the valves manufactured by defendant, I find that these claims are not infringed.

XII.

Claim 3 does not call for the provision of the cavities referred to in the preceding paragraph. However, it does call for the "lower end of said opening formed V-shaped". Although the V-shape was the preferred embodiment of this structure and although the file wrapper shows that emphasis was placed upon such shape, I found that the U-shape or round opening obtained substantially the same result in substantially the same way and that plaintiffs, even though entitled to a very narrow range of equivalents, was entitled to claim that the patent structure included a U-shape as well as a V-shape opening. Accordingly, I find that claim 3 of the Smith patent is infringed by both of defendant's valves.

XIII.

On the matter of damages, ordinarily the Court would consider other contracts entered into by the claimants as a proper standard upon which to determine a reasonable royalty. In this case, however, in view of the facts hereinbefore set forth and the fact that the patented structure represented only a minor improvement in a highly developed art, I find that a reasonable royalty is one and one-half per cent of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952, which, according to my calculations, amounts to $2,962.16.

XIV.

Upon introduction of the gate valve of the Smith

patent in suit, the pulp and paper industry extensively adopted the invention of the Smith patent, and the invention of the Smith patent has been extensively recognized in the industry as a new, novel and useful invention prior to the filing of the complaint in this suit.

XV.

Long prior to the commencement of the acts of defendant herein complained of, plaintiffs had given and granted to Crane Company of Chicago, Illinois, the exclusive right, license and privilege to manufacture, use and sell gate valves embodying and employing the inventions disclosed, described and claimed in the Smith patent, No. 2,001,271, throughout the United States of America, save and except in the eleven Western States; plaintiffs had given and granted to Western Machinery Company of Portland, Oregon, the exclusive right, license and privilege to manufacture, use and sell gate valves embodying and employing the inventions disclosed, described and claimed in said patent, No. 2,001,271, throughout the eleven Western States of the United States of America; and plaintiffs had given and granted to Crane Company, Ltd., of Canada, the exclusive right, license and privilege to manufacture, use and sell gate valves embodying and employing the inventions disclosed, described and claimed in the Smith patent, No. 2,001,271, throughout the Dominion of Canada; and each and every one of the aforementioned licenses required payment to plaintiffs as licensors of a royalty or license

fee equal to five per cent (5%) of the total sales price of gate valves covered by said license.

XVI.

The three licensees to whom licenses were granted under the Smith patent have assumed the patent to be valid, have respected plaintiffs' rights therein, and have continued to pay the required license fees up to the date of expiration of the patent, notwithstanding defendant's infringement thereof; and the gate valve disclosed, described and claimed in the Smith patent No. 2,001,271 has had wide commercial success.

XVII.

The Smith patent in suit, No. 2,001,271, expired May 4, 1952, during the pendency of this suit.

XVIII.

Subsequent to April 13, 1950, and prior to May 14, 1952, defendant manufactured, sold and/or used a total of 450 gate valves embodying and employing the inventions disclosed, described and claimed in the Smith patent in suit and as defined by claim 3 of said Letters Patent, and that the total sales price of said gate valves manufactured and sold by defendant during said period was $197,476.73.

XIX.

Plaintiffs licensed manufacturers of gate valves under the Smith patent in suit, Crane Company of America at Chicago, Illinois, Crane Company of Canada at Montreal, Canada, and Western Ma-

chinery Company at Portland, Oregon, which were the only manufacturers of the patented gate valve other than the defendant, all at the same royalty of five per cent (5%) of the total sales price of said gate valves.

XX.

Plaintiff, Walter G. E. Smith, granted and conveyed to Western Machinery Company of Portland, Oregon, the right, license and privilege to use drawings, patterns, specifications, and other data applicable to the manufacture of gate valves under the Smith patent in suit, for a rental or royalty of seven and one-half per cent (7½%) of the sales price of all gate valves manufactured and sold by said Western Machinery Company during the life of the Smith patent.

XXI.

In addition to the reasonable royalty, plaintiffs are entitled to recover from defendant their costs in this suit, taxed at $.....

XXII.

Plaintiffs are entitled to recover from defendant interest on the amount of damages herein awarded to plaintiffs in the principal sum of $2962.16 at the rate of six per cent (6%) per annum from May 14, 1952 until paid; and interest on the costs taxed in this suit in the principal sum of $..... at the rate of six per cent (6%) per annum from the date on which the judgment is entered in this cause until paid.

Conclusions of Law

I.

Claims 1, 2, 5 and 6 of the patent in suit No. 2,001,271—Smith are not infringed by the defendant.

II.

Claim 3 of the patent in suit No. 2,001,271—Smith is infringed by both of the valves manufactured and sold by defendant, identified as the Bonnet Type A Gate Valve, exemplified by defendant's Exhibit D, Plate 2, and Bonnetless Type B Gate Valve, exemplified by defendant's Exhibit D, Plate 3.

III.

Plaintiffs are entitled to a judgment against defendant for damages in the sum of $2,962.16, together with interest thereon at the rate of six per cent per annum from May 14, 1952, until paid.

IV.

Plaintiffs are entitled to recover from defendant their costs heretofore taxed by the Clerk of this Court in the amount of $....., together with interest thereon at the rate of six per cent (6%) per annum from the date on which the judgment is entered in this cause until paid.

Dated April 15, 1954.

/s/ GUS J. SOLOMON,
United States District Judge

[Endorsed]: Filed April 15, 1954.

In the District Court of the United States for the District of Oregon

Civil No. 5783

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, Plaintiffs,

vs.

FABRI-VALVE COMPANY OF AMERICA, a Corporation, Defendant.

JUDGMENT

This cause having come on to be heard, and the Court having made and entered its Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Rules of Civil Procedure, it is hereby Adjudged and Decreed as follows:

I.

That plaintiff, The United States National Bank of Portland, Oregon, Trustee, is the owner of the entire right, title and interest in and to United States Letters Patent No. 2,001,271, granted May 14, 1935, to Walter G. E. Smith, for Gate Valve, together with any and all rights of action, claims or demands arising out of, or accruing from past infringement thereof.

II.

That defendant has infringed United States Letters Patent No. 2,001,271, and particularly claim

3 thereof, by the manufacture and sale of gate valves as exemplified by defendant's gate valve bonnet Type A and by defendant's gate valve bonnetless Type B, as shown and illustrated by defendant's Exhibit D, Plates 2 and 3, respectively.

III.

That plaintiffs have and recover from defendant general damages which shall be due compensation for the making, using and/or selling of the combination of the inventions of the Letters Patent in suit, which damages shall be in the principal sum of $2,962.16, together with interest thereon at the rate of six per cent (6%) per annum from May 14, 1952, until paid.

IV.

That plaintiffs have and recover from defendant the taxable costs of the plaintiffs in this Court in the principal sum of $107.85, together with interest thereon at the rate of six per cent (6%) per annum from the date on which judgment is entered in this cause until paid.

Dated at Portland, Oregon, April 15, 1954.

/s/ GUS J. SOLOMON,
United States District Judge

[Endorsed]: Filed and Entered April 15, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States National Bank of Portland, Oregon, Trustee, and Walter G. E. Smith, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 15, 1954, and more particularly from that portion of said final judgment which says:

III.

"That plaintiffs have and recover from defendant general damages which shall be due compensation for the making, using and/or selling of the combination of the inventions of the Letters Patent in suit, which damages shall be in the principal sum of $2,962.16, together with interest thereon at the rate of six per cent (6%) per annum from May 14, 1952, until paid."

Dated at Portland, Oregon, this 12th day of May, A. D. 1954.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, Trustee, and WALTER G. E. SMITH, Appellants,

By COOK AND SCHERMERHORN,

/s/ By HAROLD D. COOK

Their Attorneys

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, The United States National Bank of Portland, Oregon, Trustee, a national banking association with its principal office and place of business in the City of Portland, State of Oregon, and Walter G. E. Smith, plaintiffs in the above entitled action, appeal to the United States Court of Appeals for the Ninth Circuit from a judgment in favor of plaintiffs made and entered herein on the 15th day of April, 1954, in the sum of Two Thousand, Nine Hundred Sixty-Two and 16/100 Dollars ($2,962.16), together with interest thereon at the rate of six per cent (6%) per annum from May 14, 1952, until paid, together with plaintiffs' costs in the principal sum of One Hundred Seven and 85/100 Dollars ($107.85), together with interest thereon at the rate of six per cent (6%) per annum from the date of entry of said judgment until paid:

Now, Therefore, in consideration of the premises and of such appeal, we, The United States National Bank of Portland, Oregon, Trustee, a national banking association with its principal office and place of business in the City of Portland, State of Oregon, and Walter G. E. Smith, appellants, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland and authorized and licensed to become surety on bonds and undertakings in the State of Oregon, do hereby jointly and severally undertake and promise on the

part of appellants that said appellants will pay all damages, costs and disbursements if the appeal is dismissed or the judgment affirmed, or which may be awarded against them on the appeal if the judgment is modified; provided, however, that said costs and disbursements shall not exceed the sum of $250.00.

Now the condition of this obligation is such, that if the said The United States National Bank of Portland, Oregon, Trustee, and Walter G. E. Smith, appellants, shall jointly or severally make payment of the costs if the appeal is dismissed or the judgment affirmed, or such costs as the United States Court of Appeals for the Ninth Circuit may award if the judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 12th day of May, 1954.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE,

/s/ By R. M. ALTON,
Vice President and Trust Officer
Principal

/s/ WALTER G. E. SMITH, Principal

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

[Seal] /s/ CLARENCE D. PORTER,
Attorney in Fact
Surety

Approved:

/s/ GUS J. SOLOMON,
United States District Judge

Duly Verified.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Fabri-Valve Company of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 15, 1954.

/s/ ELMER A. BUCKHORN,
/s/ W. B. SHIVELY,
Attorneys for Defendant

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL SUPERSEDEAS

Whereas, the Fabri-Valve Company of America, Defendant in the above entitled suit appeals to the United States Court of Appeals for the Ninth Circuit from a final judgment made and entered against the Defendant in the said suit in the said

District Court of the United States for the District of Oregon, in favor of the Plaintiff in the said suit and against the Defendant on the 15th day of April, A.D. 1954, for Three Thousand Five Hundred and no/100 Dollars ($3,500.00) damages and costs and disbursements.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Glens Falls Indemnity Company, a corporation empowered under the laws of the State of Oregon to become surety upon bonds, undertakings, etc., in the State of Oregon, does hereby undertake and promise, on the part of the appellant, that the said appellant will pay all damages, costs and disbursements which may be awarded against Fabri-Valve Company of America on the appeal.

And, Whereas, the appellant is desirous of staying the execution of the said final judgment so appealed from, it does further, in consideration thereof, and of the premises, undertake and promise that if the said final judgment appealed from, or any part thereof, be affirmed, the appellant will satisfy it so far as affirmed.

GLENS FALLS INDEMNITY COMPANY,

[Seal] /s/ J. STUART LEAVY, Attorney

Countersigned:

JEWETT, BARTON, LEAVY & KERN,

/s/ J. STUART LEAVY,

Resident Agents

Approved:

/s/ GUS J. SOLOMON

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The District Court erred in holding claim 3 of the Smith patent infringed by defendant's gate valves.

/s/ E. A. BUCKHORN,
Of Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed June 8, 1954.

[Title of District Court and Cause.]

PLAINTIFFS-APPELLANTS STATEMENT OF POINTS ON APPEAL

1. The District Court erred in holding that cavities provided for the express purpose of receiving pulp material which may accumulate in the gate grooves during the opened condition of the gate, which accumulation will be forced downwardly into the cavities as the gate is moved toward the closed position, are not present in the valves manufactured by defendant.

2. The District Court erred in holding claims 1,

2, 5 and 6 of the Smith patent in suit not infringed by valves manufactured and sold by defendant.

3. The District Court erred in holding that the patented structure of the Smith patent in suit represented only a minor improvement in a highly developed art.

4. The District Court erred in holding that plaintiffs were entitled to receive as damages royalties computed at a rate of no more than one and one-half per cent of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952, which royalties at such rate amount to $2962.16.

5. The District Court erred in refusing to find that plaintiffs were entitled to receive as damages a royalty computed at the rate of five per cent of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952, which is the royalty established by all licenses given and granted prior to the commencement of the acts of defendant complained of.

6. The District Court erred in refusing to find that plaintiffs were entitled to receive as damages additional royalties computed at the rate of seven and one-half per cent of the total sales price of all the valves sold by defendant in the eleven Western states between April 13, 1950 and May 14, 1952, in direct and unlawful competition with plaintiffs' licensee, Western Machinery Company.

7. The District Court erred in refusing to use plaintiffs' established royalty as the measure of

damages to be assessed against defendant for infringement of the Smith patent in suit.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, Trustee, and WALTER G. E. SMITH
Plaintiffs-Appellants

By COOK AND SCHERMERHORN,
/s/ By HAROLD D. COOK,
Of Attorneys for Plaintiffs-Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed June 14, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pre-trial order; Copy of oral opinion dated December 31, 1952; Copy of oral opinion dated June 17, 1953; Findings of fact and conclusions of law; Judgment; Notice of appeal by U. S. National Bank and Walter G. E. Smith; Undertaking on appeal; Notice of appeal by Fabri-Valve Company; Undertaking on appeal; Defendant's statement of points on appeal; Designation of

record by appellee and cross-appellant; Plaintiffs-appellants statement of points on appeal; Designation of record by plaintiffs-appellants; Order extending time to file record on appeal and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5783, in which The United States National Bank of Portland, Oregon, Trustee, and Walter G. E. Smith are plaintiffs and appellants and Fabri-Valve Company of America, a corporation is defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellants and appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith a copy of portions of transcript of testimony furnished by plaintiffs-appellants. The following exhibits are being forwarded under separate cover by the attorneys for appellees: Plaintiffs' exhibits 1 to 3, 5 to 7, 11 to 14 and 21; Defendant's exhibits A to E, F1 to F3, F and G, I and M.

I further certify that the costs of filing the notices of appeal $5.00 each have been paid by the appellants and the appellee.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 9th day of July, 1954.

[Seal] /s/ F. L. BUCK, Acting Clerk

In the District Court of the United States for the District of Oregon

No. Civ. 5783

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, Plaintiffs,

vs.

FABRI-VALVE COMPANY OF AMERICA, a Corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

The above-entitled case came on regularly for trial before the Honorable Gus J. Solomon of the above-entitled Court on Wednesday, March 28, 1951, beginning at the hour of 10:00 a.m., at the United States Court House, City of Portland, State of Oregon.

Appearances: Messrs. Harold L. Cook and Arthur S. Vosburg, attorneys for the plaintiffs. Messrs. W. B. Shively and Elmer A. Buckhorn, attorneys for the defendant. [1*]

HAROLD S. HILTON

called as an adverse witness by the plaintiff's having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Harold S. Hilton.)

Direct Examination

By Mr. Cook:

* * * * * [33]

The Court: It is Defendant's Exhibit G. I don't think there is any dispute as to the fact that the defendant manufactures the two types of valves about which the complaint is being made.

Mr. Vosburg: No, no dispute at all.

Q. (By Mr. Cook): When did Fabri-Valve Company of America first start to manufacture this type of valve?

A. We made some experimental ones in the latter part of 1948 and for production, the latter part of 1949.

Q. What has been the principal use of the valves manufactured and sold by your company?

A. Use in pulp stock lines in the paper mills.

Q. On the lower half of the inside of the folder identified as Plaintiffs' Exhibit 11, is what is referred to there as paper stock valve, bonnetless type. Will you describe the construction of that valve?

A. Yes, it is a fabricated structure made of an inlet and an outlet body if those are body halves, and a spacer in between. The spacer is to accommodate the plate gate. [35]

Q. Do the halves of the body, the split halves of the body and the spacer plates together constitute a groove or guide-way in which the gate is raised and lowered?

A. They do down to a tangent on the side, just

(Testimony of Harold S. Hilton.)

a short section do they actually make a guide groove. The rest would be a guide of the plates themselves, the upper end of the body. There is a ring formed by the seat on the outlet side which acts as a guide under pressure, and the ring—I should say and a portion of the inlet body around to a tangent on the side also is incorporated, I suppose, in guiding the plate down. [36]

* * * * *

Mr. Cook: We are offering them now, your Honor, to place them of record. They show public acceptance of Plaintiffs' valve structure. They show it is produced both in this country and in Canada. The fact that it has been accepted and is in use from its very inception to the present moment, more than a period of 20 years, is to show, has a great deal to do with that bit of Patent Law which says that public use and public acceptance, commercial use shows——

The Court: Maybe Mr. Buckhorn will stipulate to that. Will you stipulate that the valve produced by the plaintiff is in wide use and sold in the United States and Canada in quantity?

Mr. Buckhorn: That's right, we stipulate to that.

Mr. Cook: And that it is in use at the present time?

Mr. Buckhorn: That it is in use at the present time.

Mr. Cook: And ever since its inception has been?

(Testimony of Harold S. Hilton.)

Mr. Buckhorn: Well, I couldn't prove that. I wouldn't stipulate [39] as to that.

Mr. Cook: Even though it is in use at the present time?

Mr. Buckhorn: Yes.

The Court: Well, you can have Mr. Smith testify that it has been in use ever since it has been manufactured many years ago.

Well then, all of the Plaintiffs' Exhibits with the exception of 15, 16, 17, 18, 19, and 20 are admitted.

(Thereupon the Plaintiffs' Exhibits above referred to, previously marked for identifications, Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, were received in evidence.)

The Court: The defendant stipulates that the valve produced by the plaintiff is now in widespread use in the United States and Canada. Now, Defendant's Exhibits. Mr. Cook, how about Exhibit A?

Mr. Cook: No objection, your Honor.

The Court: Exhibit B?

Mr. Cook: No objection.

The Court: C, any objection to C? [40]

* * * * *

Q. (By Mr. Cook): Mr. Hilton, I believe you and I had gotten along to where you were describing one of the defendant's valves, and the particular valve in description was the bonnetless type stock valve having a split housing, half of which comprised an inlet port and half outlet port with

(Testimony of Harold S. Hilton.)

a spacer plate there between, and the adjacent parts of the housing and the spacer plates provided a groove or guide-way for the gate. And then when the gate [45] entered the through way of the valve, that is, the pipe, through way of the valve, the groove was taken up, and the function of the groove was taken up by inset rings; is that what you testified to?

A. The function of what? I didn't quite——

Q. I say, that the job of the groove, the function of the groove as provided by the two halves of the housing within the through way of the valve, the job of providing the groove for the gate was taken by rings inset in the pipeline?

A. Yes, there is a ring on the outside, on the outlet side all the way around to form a seat on the outlet side.

Q. And on the inlet side?

A. It does not go all the way around.

Q. There is a ring there, but it is cut away at the bottom? A. That is correct. [46]

* * * * *

Q. Is there a seating ledge or an equivalent structure in all of the valves manufactured by Fabri-Valve Company?

A. Yes, there is a seating—there is a seat on all of the outlet [50] ports.

Q. What is the function of that seating ledge?

A. To give a landing for the plate gate in the closed position.

Q. That is to take the thrust of the pressure of

(Testimony of Harold S. Hilton.)

the inlet fluid? A. Well, yes, that's right.

Q. Is that right? A. That is correct.

Q. That valve does not employ a wall on the inlet side of the groove for the gate; is that true?

A. How was that now?

Q. I say, that valve, being Valve No. 1063, of which this is a model, does not employ a wall on the inlet side of the groove for the gate at the bottom of the valve?

A. Oh, you mean in this position here?

Q. That's right. A. No, it does not.

Q. Do any of the Fabri-Valve Company valves employ the double walled groove at the bottom of the valve? A. Only the wedge gates.

Q. Only the wedge gates. Those valves are not valves which are involved in this suit; is that right?

A. No.

Q. I notice the inlet floor, the floor of the inlet side of the housing in that valve, slopes toward the base of what we call the transverse wall in the Smith Patent? [51] A. Yes.

Q. For what purpose?

A. Well, that is to allow for a landing on the outlet of the valve, and also to coincide with the spacer ring so that it will be flush with the spacer ring and will not leave a groove to collect whatever material the pipe is carrying so that it will enable it to close at all times.

Q. By a landing do you mean a seat for the gate? A. Yes.

Q. In that valve does the groove in which the

(Testimony of Harold S. Hilton.)

gate slides come to infinity, that is, does it come out to nothing adjacent to the floor of the valve?

A. I don't quite follow you.

Q. Does your groove end adjacent the floor of the valve?

A. No, it ends up on the side, up closer to the center line.

Q. On each side of the valve?

A. Yes, uh-huh.

Q. So that the grooves for the gate disappear?

A. That's right.

Q. In the side walls of the valve?

A. Correct.

Q. What happens to the material which is lodges in those grooves during the flow of materials through the valves?

A. Well, some of it comes out, I suppose.

Q. Are you familiar with the operation of these valves? [52] A. Yes.

Q. Is it true that during the operation of the valve fibrous pulp fibers will collect in that groove?

A. Yes.

Q. And then during the closure of the gate what happens to that material?

A. Well, some of it is pushed ahead of the gate out of the closure, out of the guide. Some of it passes on up into the body.

Q. What do you mean, some of it passes on up into the body?

A. Well, I mean there is enough clearance here that some of it goes up against the packing.

(Testimony of Harold S. Hilton.)

Q. You mean such bonnet as there is on this type of valve can fill up with pulp fibers?

A. Well, any place that there is an opening I would say that the liquid would carry some of the fibers up into it, yes.

Q. And some of the fibers, you say, which collects in the groove is pushed ahead of the gate and out of the groove and onto the floor of the valve; is that correct?

A. Well, is would have to to close the valve, yes.

Q. Do you provide your sloping floor on the inlet side as a recess then to catch that material scraped out of this groove?

A. Not particularly to catch what is scraped out but to keep what might collect on the bottom from building up so that it will not shut, so that you cannot shut the valve.

Q. How do you reflect that? Would you explain that a little more? [53]

A. Well, if the line is a horizontal position and it remains at rest for any length of time or any of it settles out, why, it's straight through here. This gives it a chance to seat, yes.

Q. Well, I am not certain that I understand your answer yet as to the purpose of your downwardly sloping inlet floor where it slopes down to the bottom of your transverse wall.

A. Well, that is so that it will not trap any material in between the two seats like a wedge gate, as you have indicated, and build it up so you cannot shut it.

(Testimony of Harold S. Hilton.)

Q. Is it true, Mr. Hilton, that in the conventional type gate valve where the gate seats in a groove having two side walls that the groove will fill with pulp material?

A. Yes, any time there is a two seats as such with a wide gate on the bottom it will build up and then—that's just natural for that to do that. [54]

* * * * *

Q. Is that gate in that valve supported against the thrust of the inlet pressure when the gate is closed?

A. You mean in this position? (Indicating.)

Q. In the closed position.

A. Is it supported against the outlet body?

Q. Is it supported against the pressure of the inlet fluid, against the thrust?

A. Well, yes.

Q. What support is provided?

A. The seat on the outlet side of the body.

Q. How is the valve mounted, that is, which is the upstream or pressure side of the valve?

A. This is the upstream side of the valve. (Indicating.)

Q. By that you mean the side of the valve having the housing wherein the floor slopes to the base of the transverse partition or wall?

A. That is correct. [55]

* * * * *

Mr. Buckhorn: Your Honor, I object to that last question and again for the reason that the wedge gate valve is not a conventional stock valve

(Testimony of Harold S. Hilton.)

to which the valves in suit more specifically relate. The wedge gate valve is never used in a stock flow line but is used merely in clear fluid line, a clear water line or something of that sort. It is not a conventional valve in a conventional flow line.

The Court: Objection overruled, go ahead.

Q. (By Mr. Cook): In other words, Mr. Hilton, it is your position that where you have a groove such as you find in a conventional valve, gate valve, where one wall is not cut away as in the present [57] structures, that within that groove you would find an area of low pressure where pulp stock would be inclined to deposit during the operation of the valve; is that true? A. That is correct.

Q. Do you have knowledge upon which to express (that) an opinion as to the efficiency of a gate with a groove cut away on the outlet side of the valve? For instance, if you turned these valves around, the solid ring were on the inlet side and the ring on the outlet side were cut away, do you have knowledge which would permit you to form an opinion as to the efficiency of such a valve? What would be the tendency of operation?

A. Well, as you have put it, it would just leak. You have no seat on the downstream side or the side opposite from the low pressure. [58]

* * * * *

Q. (By Mr. Cook): In valves of your construction one type of valve is the split housing and one wall—wherein the inner wall of the outlet side

(Testimony of Harold S. Hilton.)

of the housing forms the seat for the gate; is that true, like the one you have in your——

A. Yes.

Q. Like the model you have in your hand?

A. Yes.

Q. The other type of valve which you make is where you use rings welded into position, one solid ring forming the seat of the gate and the other ring forming the guide; is that true?

A. That is correct.

Mr. Vosburg: That is Exhibit H.

Q. (By Mr. Cook): The latter type of valve is exemplified by Defendant's Exhibit H, I believe. That's your other valve over there.

A. That's the bonnet.

Q. That's the bonnet type valve?

A. Yes, paper stock, yes.

Q. Is that true, and those generally are the two types of valves involved in this action?

A. Yes.

Q. Are you manufacturing valves of these types at the present time?

A. Which type, both? [59]

Q. Each type.

A. We are manufacturing the bonnet type stock and the bonnetless type stock, which is, which does not have a split housing.

Q. Referring to Exhibit 11, the bonnet type stock valve is illustrated at the top of the page?

A. Yes.

Q. And the other valve you refer to, the bonnet-

(Testimony of Harold S. Hilton.)

less type which doesn't have a split housing, is that, how does that differ from the valve illustrated at the bottom of the page?

A. Well, it is similar to the bonnet stock except that it has, except that it is bonnetless and that we just incorporated a rectangular packing which (floats) fits right on the flange of the body of a bonnet type.

Q. Well, is it a one-piece valve?

A. Well, the body is one-piece, yes.

Q. And what in that valve, what forms the seats? A. The same as the bonnet type.

Q. In other words, you mean rings?

A. That is correct. [60] * * * * *

JOSEPH W. GILL

a witness called in behalf of the plaintiffs, having been first duly sworn to tell the truth, the whole truth and nothing but the truth was examined and testified as follows:

Direct Examination

By Mr. Cook: * * * * *

Q. Were you ever associated with Mr. Walter G. E. Smith and in what capacity? [63]

A. Well, I was employed at the Smith & Watson Iron Works and Smith & Valley Iron Works as an engineer and as Chief Engineer the last, for the last six or eight years.

Q. During the period of the last six or eight years of your employment with the Smith & Wat-

(Testimony of Joseph W. Gill.)

son and Smith & Valley Iron Works, what was principally the business of that company?

A. Well, in the latter years of that period it was work in connection with machinery and equipment for pulp and paper industry.

Q. What was your connection with that work?

A. Well, as Chief Engineer and head of the Design Section I had charge of it all, didn't do it all myself, but I had charge of the men that were doing it.

Q. Approximately how many men were employed by the Company?

A. Well, I would say in the neighborhood perhaps of two hundred or more. [64]

* * * * *

Q. Are you familiar with the type valves used by the pulp and paper industry preceding the time of the development of the Smith valve?

A. Well, yes, I would say that I was.

Q. Can you tell the Court of the nature of those valves; what kind of valves were they?

A. Well, they were—the most commonly used was what was called plug valve. It was a body with a rotating plug and a round hole [65] through the plug which matched the entrance and outlet openings of the valve, and it turned in that casing. That was the most familiar type, though there were several other types. There was what might be called now—well, it had a raising and lowering sort of a tube that went down and cut across the flow of

(Testimony of Joseph W. Gill.)

the stock. That was one and, well, those were the main ones that I just recall now.

Q. Were gate valves commonly in use in the pulp and paper industry?

A. Well, not as a rule, although I think there were types of gate valves used through the mills.

Q. I am speaking now for controlling the flow of pulp.

A. I think, well, I am not definitely sure, but I think there were some used in places.

Q. What can you say as to the satisfactory operation of valves in the pulp and paper industry?

A. Well, they were not satisfactory because they were more or less of the type of the common gate valve that is used for water or the gate valve that is used for the steam, water and oil which has a pocket down under the seat, and the valve usually seats in a wedge-shaped seat, and the pocket down below is a great collector of stock, and then even the ones that I was trying to picture in my mind, I think there was some with a plate, raising and lowering plate that went down in between, but it had a pocket down at the bottom and was probably made just with a flat bottom edge. I am just trying to remember that, but I believe I have seen such [66] valves used in the mills.

Q. What was the principal difficulty with the round plug valves?

A. Well, the main objection was to the fine fibers of stock getting into the rotating plug and

(Testimony of Joseph W. Gill.)

housing, making it difficult to operate, and then another thing, if they are made loose enough so they will operate easily the pulp dehydrates very quickly after the valve is shut off. In other words, the water runs out of it, will leak through the valve. That's what would cause the trouble in the pipe line. They have to be cleaned out and washed out and pipes disconnected.

Q. What happens, Mr. Gill, when the water seeps through a valve?

A. Well, it seeps out of the pulp adjacent to the valve, and it keeps working back until finally that gets dried out to such an extent that it just forms a solid mass in there.

Q. Then what happens?

A. Well then, they just have to go to work and clean it out.

Q. What are the common sizes of pulp fiber; do you know?

A. Well, I don't know, but they are measured in a few thousandths of an inch. I know that, very fine they are, microscopic almost. In fact, we have looked at them with a microscope.

Q. Can you explain to the Court the manner in which the Smith valve solved some of the problems confronting the pulp and paper industry at that time? Now I have handed you, Mr. Gill, I have handed you Plaintiffs' Exhibit 6 which is a plastic and wood model of the Smith valve. [67]

A. Well, one of the things this valve did, it did away with this pocket at the bottom that an ordi-

(Testimony of Joseph W. Gill.)

nary gate valve with a flat blade type might be. It did away with that by relieving all this ring at the bottom or around the bottom edge of this, see, and then by making the blade a knife edge on the bottom, that is, tapering toward the outflow of the valve. As this comes down any pulp that might be lodging in it or if it had particles down in this area, as this came down it would go down through it and, being forced against the seat, would scrape it off the seat and push it back into this free area here. (Indicating.) Now, that was the—that is really in my mind is the main feature of the valve.

The Court: Where is the ring?

The Witness: Well, there is no ring in this, well, you might call this a ring on the outlet side. It forms a surface to support the valve, to support the leaf. It's a supporting area for the leaf, but there is no ring on this side. Well, you can call it a ring. It might be a ring. It's this portion coming down here which is relieved at the bottom so that the pulp that is scraped off, if there is any in here, it can be scraped off by this and pushed down to this bottom plate here and shoved out into a free space.

Q. (By Mr. Cook): Now by bottom plate, Mr. Gill, you are referring to the recess in the bottom inlet side of the valve? A. Yes, sir.

Q. What relation does the recess formed by the sloping floor on [68] the inlet side of the valve

(Testimony of Joseph W. Gill.)

have with the grooves which form guide-ways for the gate?

A. Well, it's at the bottom end of the grooves. It forms an opening at the bottom of the grooves so that pulp that might be lodged in there could be scraped off on the face towards the opening. There is a possibility of it, and then it would be removed through the opening down there. (Indicating.)

Q. Are you familiar with the Defendant's valves?

A. Well, I have been looking at it there, and I did see one of the valves once before, yes, I am somewhat familiar with it.

Q. I would like to hand you Plaintiffs' Exhibit 7, I believe, and ask you if you find in that structure, in that valve a structure similar to the one you have just been describing? In the first place, is there a transverse wall against which the gate seats?

A. Yes, there is, there is the front wall, and then it's free, it has a free flow backwards from the plate where it comes down at that knife edge.

Q. By reason of what, of what construction?

A. Well, it is a sloping bottom here and sides up to the point where the guide runs out.

Q. In other words, there is a guide-way for the gate in that valve? A. Yes, sir.

Q. And there is a bottom which slopes away from the valve when seated? [69]

A. Yes, sir.

(Testimony of Joseph W. Gill.)

Q. And the grooves which form the guide-way for the gate empty into the recess formed by that sloping floor; is that right?

A. That's right, yes.

The Court: We will take a brief recess.

(Thereupon, a short recess was taken.)

(Trial resumed.)

Joseph W. Gill, recalled, testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Cook): Mr. Gill, what is the function of the knife edge of the gate?

A. To clean off the face of the, the seating face of the valve, and then if there should happen to be any lodgement of pulp down here at the bottom to come down into it and force it away from the seat.

The Court: A flat seat would not do that?

The Witness: Well, it might push it off to the side to that extent, but when it came to the bottom it would just commence building up, and pretty soon you would not be able to shut it.

Q. (By Mr. Cook): What is the function of the seating ledge or transverse wall between the inlet and outlet ports?

A. That's to support the slide or leaf or valve, whatever you want to call it.

Q. The gate? A. Yes, the gate. [70]

Q. Is the gate in Defendant's Exhibit 6 valve supported across the opening in the same manner as the Smith valve?

(Testimony of Joseph W. Gill.)

A. Well, it is in the same manner just—except for the shape of the bottom portion of the Smith valve. Outside of that it is supported all the way down.

Q. By what reason, that is, by what reason of structure?

A. Well, that, the ledge on the outlet side, the ledge on the outlet side supports that, and as the rounded edge of the plate comes down across that it gradually creeps out over that and when it's shut beyond the bottom surface then it is supported all around by that ledge on the outlet side of the gate.

Q. Do you find the arc or circle of the lower end of the gate in Defendant's structure of longer radius than the outlet opening?

A. Yes, it's a longer radius. It would have to be or, otherwise, it wouldn't cover the—you see, it comes down from the sides of the leaf, and it is wider than the opening, so, naturally, it has a longer radius.

Q. And because it has a longer radius, it makes a larger area than the area of the opening; is that true?

A. That's right.

Q. And finds support across the opening as it closes; is that correct?

A. That's right, as it goes clear down it is supported on the bottom as well.

Q. I am a little forgetful here. I believe you—

(Testimony of Joseph W. Gill.)

or did you [71] testify that in Defendant's structure the grooves in which the gate slides are cut away to discharge the material therefrom into a recess at the bottom of the valve; did you testify to that?

A. I don't remember just what I did say there, but they do, they do run out, that is, they come down against the lower edge of this, down to the seat where it curves up and then there is a little —up to the tangent that runs into the edge of the guide, but they do run out down there. It's sort of a tapering edge running out there. You might call it a pocket or call it whatever you want. It just gradually runs out.

Q. Is there a recess or something, whatever you want to call it, where the groove runs out?

A. Well, there is a little small recess due to the fact that the bottom edge of the plate is beveled off. There is just a little bit of a recess there.

Q. Well, I am talking about in the housing.

A. Well, no, no, it is formed by the housing. It is not an additional recess. It is just—the edge of the housing comes down there, the beveled edge of the plate makes a little recess in there. I don't know whether I make myself clear or not. You might take a look at it.

The Court: No, I understand.

Q. (By Mr. Cook): And material which is caught in the grooves in which the gate slides is pushed out of the grooves by the descending [72]

(Testimony of Joseph W. Gill.)

gate through these recesses and into the bottom of the valve; is that true?

A. Yes, that's true. [73]

* * * * *

Q. (By Mr. Cook): This valve, valve h, Mr. Gill, is formed with a solid piece of tubing?

A. Yes.

Q. It is not a two-piece valve? A. No.

Q. The valve j is a two-piece valve?

A. That's right.

Q. Valve h is simply a one-piece tubing with a slit cut in one side of it for the gate to slide into?

A. That's right. [75]

Q. And on either side of the opening for the gate are welded rings? A. That's right.

Q. One solid ring to form a seat for the gate and one portion of a ring to form the walls or guide for the gate on that side, on the inlet side; is that correct?

A. That is correct. It does the same thing as the other one with this exception, that the other one is cut away like that there. I wouldn't know why that was left on there.

Q. Well then, in valve h the ring on the inlet side of the valve is cut away at the bottom of the valve? A. Is that the one here?

Q. Valve h.

A. Yes, it's cut away just like the other one. In other words, this surface runs right straight down, and as the valve comes down it can go down here, and any lodgment of the pulp or anything

(Testimony of Joseph W. Gill.)

that's been scraped off or been here can come down and be pushed back.

Q. You are speaking of any lodgement of pulp which may be at the base of the gate?

A. That's right. [76]

* * * * *

Q. (By Mr. Cook): In other words, as I understand your testimony, Mr. Gill, it is your position that the solid ring which forms the transverse wall in this valve or what defendant's counsel was pleased to call the seating ledge, is exactly the same structure as the seating ledge in valve j; is that correct?

A. Yes, that's right. It is the same thing as that.

Q. And on the forward side, on the inlet side of valve h, the ring that has been cut away at the bottom of the valve so as to open up the side of the groove provides exactly the same structure as the groove in valve j which runs out adjacent to the bottom of the valve?

A. Just the same, same thing, only I shouldn't——

Q. Now, will you please—what were you going to say?

A. I can't say it doesn't do it quite as good. If that little corner was cut off there it would do it better.

Q. Well, please compare this valve and the Smith valve in respect to means for performing the function and the result accomplished.

(Testimony of Joseph W. Gill.)

A. Well, I would say that it does the same thing exactly.

Q. You mean that the——?

A. It will push, it will push, first off it comes down against this, the seat, as it closes, and any accumulation of pulp here will be pushed away by the knife edge allowing the slide from clear down to the bottom of the seat, and by the same token anything in the guide here—and I guess that's supposed to be tapered back there, too—it don't feel like it—but it could [77] be pushed down around here and then it would be pushed around to this point and then be free so it actually does the same thing.

Q. "Up to this point," you mean where the groove runs out?

A. Where the groove runs out, yes. Any pulp that was lodged in here would be pushed down, right on down by the valve and come out. There is a ridge there.

Q. Would you say that the purpose in cutting away the ring on the inlet side of this valve would be any different than doing without the wall on the inlet side of the Smith valve?

A. No, I would say it does the same thing. It answers the same purpose.

Q. Would it perform any additional function?

A. No, I wouldn't say that it would, or any better. It does the same thing.

Q. Then the groove in the Defendant's structure, valve h, the fact that the inlet side of the

(Testimony of Joseph W. Gill.)

groove is cut away is intended, in your opinion, to perform exactly the same function as the structure of the Smith valve? A. Yes, sir.

Q. Is that true? A. Yes, sir.

Mr. Cook: That's all, your witness. [78]

* * * * *

WALTER G. E. SMITH

one of the plaintiffs, called in his own behalf, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Cook:

* * * * * [82]

Q. What was your experience with relation to valves for controlling the flow of pulp?

A. Well, I didn't get into that to any great extent until we got in the deal with Valley Iron Works, and they thought they had as good a line of equipment as anybody, and including that was what they called the Valley Plug Valve, which I heard Mr. Gill describe it to you a while ago as just simply a plug with an opening through the center corresponding with an opening through the walls of a cylinder which turned on a radial axis. We found that in applying this to the West Coast operations here that the pulp was much finer, and it gave a great deal of difficulty, so while we sold a great many hundreds of them, we never considered their operation successful, and were always

(Testimony of Walter G. E. Smith.)

seeking a way out to get something better. So that is why I started to build one. That wasn't the only one. We built what was called the Reed Valve, which was a plunger type valve just like a piston [84] going down into a cylinder with pipe connections at the bottom, the plunger crossed the flow of the stock and closed it that way. That had too much area though there are still quite a few of them in operation, for such operation, that with sulfite pulp, and it plugged up very easily, and you couldn't move it, but it worked all right in sulfate.

Q. At that time were gate valves in use in these particular places?

A. Oh, yes, there was a straight type gate valve that had been in use more or less, made by Record Company, a Maine concern. There were also some made in the Middle West. They were not very successful out here, and the gate valves in general use out here, though they didn't use bevel gate valves, there were hundreds of them in use in stock lines and they gave endless trouble.

Q. For what reason, Mr. Smith?

A. Because the slot at the bottom plugged up. They had a slot at the bottom which they also had with the straight type gate valve. [85]

* * * * *

Q. How successful is the operation of those valves?

A. Well, in some instances it's all right. They can be used in [86] some cases, but wherever they have a pressure operation in which stock is pumped

(Testimony of Walter G. E. Smith.)

under pressures that range above 15 or 20 pounds of pressure, then they are absolutely hopeless. I might say this, Mr. Cook, that during the years prior to 1930 pulp was not pumped around the mills under any great amount of pressure. In other words, that was a thing that developed at that time with the changing technique.

Q. As pressure was increased in the pulp lines did the valves give additional——?

A. Then the trouble increased with them.

Q. You say the trouble was increased with them? A. Multiplied.

Q. With the increase in pressure it increased the trouble?

A. That is correct, because the pressure found the various orifices and the opportunity to enter into areas between contacting surfaces. They had to be more or less open so they could operate and function. Well, they couldn't be absolutely tight so pulp would be forced into those orifices. That's what gave the trouble. [87]

* * * * *

Q. Did mill operators approach you with the problem regarding valves and ask you——?

A. Many times, many times because every one knew that the operation of no valve at that time was completely successful. No valve even approached it in this territory around here where they were making a higher grade sulfite pulp and a very much thinner cook so their valve trouble

(Testimony of Walter G. E. Smith.)

increased correspondingly. As as result, they were having plenty of trouble.

Q. When did you first start to work on this problem, Mr. Smith?

A. Well, I had a big order for valves from Crown Zellerbach Corporation, of which Mr. V. D. Simonds of Chicago was the engineer. [88] In the changes that they made in 1929 and '30, I supplied them with, oh, probably four or five hundred valves, plug valves and plunger type, and when they got into operation wherever they had high pressures they began to give troubles, so Mr. Simonds requested of me that I try to solve the problem for them, and that was the result of it. They wanted to put my valve in a place where they were operating under considerable pressure, probably the highest that any of them had ever attempted before. The valve in use was making a failure of it. They could not open it and close it when they wanted to so I designed one, built it for them, and I think it is still there.

Q. What do you mean, "there?"

A. In Camas, in the mill. [89]

* * * * *

Mr. Buckhorn: Yes, I do in a Patent of this sort, one which is merely an improvement of a Patent in a highly developed art. For example, in the Hedrick Patent which was referred to by Mr. Gill, that particular Patent discloses a round opening on the reverse side. Mr. Gill testified that insofar as the valve structure is concerned, that

(Testimony of Walter G. E. Smith.)

shown in the Hedrick Patent is the full configuration equivalent of the valve structure shown in the sample unit, and it is absolutely improper for a higher interpretation to be placed upon it to broaden the scope and broaden the use thereon of a valve of any structure other than a V-shaped opening.

Mr. Cook: If your Honor please, a Patent is measured by its claims. As Mr. Buckhorn told you this morning, a Patent comprises drawings illustrating the device, a description of the device, and then the definition of the invention, which are called claims, and there can be as many claims as the Patent Office will allow. Not all the claims are alike. In fact, none of them are alike. In this Patent there are six claims, and there are six different definitions of the Smith invention, and the first two claims do not recite the shape of the opening through the valve. In fact, they do not even mention it.

The Court: Mr. Cook, I am going to exclude this exhibit on [91] the ground that it was not marked as a pre-trial exhibit, but you may interrogate the witness as to the contents, not on the same material.

Mr. Cook: That's primarily why I was handing it to him, so as to refresh his memory on the particular valve.

The Court: He can testify about it, but he cannot use it for any purpose whatsoever.

Q. (By Mr. Cook): Mr. Smith, do you remem-

(Testimony of Walter G. E. Smith.)

ber the construction of the valve installed in the mill at Camas, the first valve about which you were testifying a moment ago?

A. Yes, I do.

Q. Can you describe it?

A. It was almost the identical valve that we have today with the exception of the outlet side was round instead of V-shaped bottom. That was the only difference.

Q. In other words, the valve incorporated all of the essential elements of the Smith Patent; is that your contention? A. I think so, yes.

Q. Was the gate supported across the opening?

A. It was.

Q. By a transverse wall?

A. By a transverse wall as also is this one.

Q. I have supplied you with the plastic and wood model of the Smith valve, which is Exhibit No. 6, and will you point out to the Court how the first valve placed in operation in the Crown [92] Zellerbach Mill at Camas differed in structure from this valve?

A. I didn't quite get you on that, Mr. Cook. You will have to pardon me, I am a little bit hard of hearing.

The Court: Mr. Cook, will you either speak louder or do you want to take a seat in the jury box, which is closer?

Mr. Cook: I have a rather soft voice.

Q. (By Mr. Cook): I have supplied you with

(Testimony of Walter G. E. Smith.)

the plastic and wood model of the Smith valve, which is Plaintiff's Exhibit No. 6. A. Yes.

Q. And will ask that you use that model in explaining to the Court the construction of the valve placed in the Crown Zellerbach Mill at Camas, the difference in construction.

A. Your Honor, that valve was designed identically the same as this, except that this opening here was round instead of V-shaped. Everything else was identical. I might say that the guide slots on the intake side of the valve were very much shorter before they faded out. This recess or cavity that has been mentioned is neither a recess nor a cavity. It is merely the fade-out of the guide wall, is all it actually is, because the bottom has always come flush. On the one side it makes a transverse wall, which is the—the guide slot becomes the transverse wall at the bottom, and that is full and complete all the way around as you see it here in this black section. On the opposite side or the intake side the guide is cut away to permit the stock to be pushed out through the bottom when you are closing the valve. It is merely [93] cut away flush with the bottom of the outer edge of it. You see the same thing, it is flush across there, flush across there, and it's merely—all that happens here is that that section of the guide on the intake side is removed at the bottom to relieve the valve plugging up at that point. That permits the stock to return into the circulation, and the central wall here closed the valve at all times.

(Testimony of Walter G. E. Smith.)

Q. Do you find a similar structure in defendant's valve identified as Exhibit J?

A. Well, I find that instead of a rectangular section on the intake side and a V-shaped section on the outgoing side, they have a round section, two concentric circles practically, one with a little larger radius than the other which permits, when they are bolted together, it permits one to be offset from the other. That creates the wall, and a slot which is a full slot all the way around on the outlet side, fades out about mid-way on the intake side which —it fades out a little lower down on this one and fades a little higher up on this one. And I notice that one valve, it fades out differently. One valve fades out way up here, and the other valve fades out way down below here on the round section, but on that thing there that fades out mid-way. That's where the bottom begins and the top ends, see, the bottom of the valve——

Q. Just a moment, when speaking of that valve you are speaking of Plaintiff's Exhibit 7? [94]

A. Plaintiff's Exhibit 7.

Q. Which is your model of the defendant's valve?

A. This is it. The bottom begins here. (Indicating.)

Q. You are pointing to a line of mid-center?

A. That's right, that's where the bottom begins, and it is cut away from there on. You see, Judge, this is——

The Court: Is that the ring?

(Testimony of Walter G. E. Smith.)

A. This is—it's a guide ring, yes. It's a guide ring there, you see, to there, but then she fades away and there is no more guide ring past that point. We do the same thing, only a little lower down. There is nothing in our claims to show that it has to be one-half inch or three inches or four inches from the bottom or the top. Where is the bottom here, except that it begins here? (Is) The bottom anywhere along there(?).

Q. Now, Mr. Smith, you have testified that in your first valve you installed at Camas the outlet opening, that is, the opening through the outlet portion of the valve, was round?

A. That's right.

Q. Instead of V-shaped at the bottom?

A. That is correct.

Q. Will you tell me the story of the transition from a circular opening or a round opening to this V-shaped opening?

A. Well, I can say only this, that I found out in my experiments with putting valves under pressure that where the big valve, which we started with, the 14 inch valve, and we didn't have our gate [95] too thick, which made it rather sharp on the edge, and when it was put under pressure she bowed slightly and started to shave the surface of the seat which would be the equivalent of this. (Indicating.) You see, so as a consequence of that I thought by straightening out that line there and coming down——

Q. You are pointing to the circular wall?

(Testimony of Walter G. E. Smith.)

A. And straightening out that bottom round section here and making it a V-shaped section. When I straightened that out I found out that the support for the gate was much better, and there was no wear on the surface of the valve seat. We started out making them of rather soft bronze and making them fairly sharp. The result was the slightest bowing there would shave the cast iron section and turn the edge. We tried to protect that first by putting a lead seat in the bottom. We found that that was impractical because the men cinched it down too hard and wrecked the seat just the same, and the valve gate, so we discarded that.

Q. Mr. Smith, is it your contention that you have novelty in this V-shaped opening?

A. Well, I don't know, it is a little bit different. It might be a novel type. We could have gotten by very well without it.

Q. Well, you did make a circular opening, round opening?

A. Yes, we did, but we thought this might be a little better, was the only reason for using it.

Q. Your first valves were with a round opening?

A. Correct, and, as I said to you a moment ago, the first valve [96] after 20 years is still functioning.

Q. Now is it true that whether it be a round opening or a V-shaped opening that the valves function the same?

A. They appear to; they appear to.

(Testimony of Walter G. E. Smith.)

Q. What is the function of that transverse wall in your valve?

A. The transverse wall is supposed to support the valve gate (and) in closing.

Q. Would that be true in this defendant's structure?

A. It is identically the same in principle.

* * * * *

Q. Now you have been talking about these features of your invention the gate valve embodying your invention. Can you tell me the relation of the grooves for the gate and the recess formed by the sloping floor of the inlet side of the housing?

A. Well, obviously, you must have a groove to slide the gate in. That's what the grooves are for, and they have to be made in one way or another in this way whether made between two halves, or two sections of the body which when bolted together provide the outer walls of the guides. We also (firmly) formerly milled one section to provide the end wall though a number of them were made with filler pieces which accomplishes the same purpose but with a little [97] different machining cost which is involved in the thing. It all boils down to how much does it cost, what can you get for it.

Q. By "filler pieces" do you mean a spacer?

A. Well, that's the spacer, which is, in effect, this thing.

Q. That's the structure embodied in these two?

A. That separates the two halves so the gate can be transverse between them.

(Testimony of Walter G. E. Smith.)

Q. As in the defendant's structure?

A. That is correct. In this one it is this piece here. (Indicating.)

Q. You are pointing to Exhibit 7?

A. This center piece, yes, this is the defendant's structure. [98]

* * * * *

The Court: Is that what you claim is the novelty in your invention, the transverse wall and the slope on the intake side?

A. The effective element which makes this valve work and which makes that one of mine work is the fact that the slots are enabled to be cleaned by having an opening at the bottom—or make it this way, that the guide slots on each side are cut away on one side of the valve which is the intake side. By cutting one away it permits a clearance of the stock that is in the valve up there and is transverse through the valve, and when you shut off this valve the stock piles up so fast that it is just practically a solid mass instantly.

The Court: In other words, you contend that prior to the time you began to make this gate now prior gate valves had a slot that extended the full length of the gate?

The Witness: That is exactly correct. They didn't realize what they were doing when they were plugging up this stock in the bottom. [100]

* * * * *

Q. (By Mr. Cook): Is it true, Mr. (Cook) Smith, that the sloping floor of the inlet side of

(Testimony of Walter G. E. Smith.)

the housing provides the recess into which [102] material is scraped by the gate?

A. Yes, it does.

Q. And is that true in defendant's structure?

A. It appears to be, yes.

Q. Are the two models you have before you, are they identical in that respect?

A. Correct, they are. [103]

* * * * *

Q. Mr. Smith, I have laid a tablet on your desk on which I have drawn a line which represents the bottom of the tube forming that valve and on which I have drawn a rectangular cross section representing the solid ring. If that ring were continued it would come down to the place indicated by the dotted line. Is it true that pulp passing through the valve will find a path or flow over the top of that solid ring?

A. It will run level. It will fill it up to that point.

Q. Well, of course, but I mean then when this portion, this space if filled would your flow be over this point? (Indicating.)

A. That is correct.

Q. Formed by the inner surface of the ring?

A. Yes, the same as a transverse wall.

Q. Then do you get the equivalent of a structure like this (draws on paper) where the ring, the inner surface of the ring is on a level with the outer opening of the valve or of the opening of the valve?

(Testimony of Walter G. E. Smith.)

A. You do because the flow of stock immediately makes it level.

Q. In other words, the stock would (show) fill up in this space again? A. That is correct.

Q. So that this has the effect of being solid here, and it would have the effect of being solid in there; is that true?

A. That's right, that's the way it functions.

Q. So that though the floor of the valve on the inlet side does not slope downwardly to the valve seat, the action of the pulp in flowing through the valve has exactly the same action in the valve?

A. That's right.

Q. Now will you take the pencil and if you want to make a better drawing than that, you have my permission. A. No, that's all right.

Q. I would like to have you explain that to the Judge and make appropriate drawings so that he can understand it. I would like the Judge to see that.

A. Judge, here is what Mr. Cook is trying to show and to get me to verify. Now this is the situation in the ordinary valve, Judge.

Q. (By Mr. Cook): The tube is straight? [114]

A. We show here a depressed floor. This is the bottom, the bottom of the v theoretically or the bottom of the slot, you see. That would be here, you see. In other words, you have got practically a straight line across there. In order to get the straight line you have to depress this. Now that's what you have in this instance. In o there they put

(Testimony of Walter G. E. Smith.)

a ring there which lifts that from the floor, and in this particular operation the stock merely flows up to it, fills in here and you have the same equivalent. She fills in from the entrance right straight across just like silt flowing into the corner. It fills up level. That's the way we make sandbars.

Q. In other words, then, it is your position that the structure illustrated on Plate 2 which is Exhibit O is the equivalent of the Smith structure having the depressed floor on the inlet side.

A. Correct. Works out the same way, yes. [115]

* * * * *

Mr. Cook: Well, did the witness testify that the transverse wall is obviously to support a gate against the thrust of the incoming liquid?

The Witness: Yes, I think I mentioned that. That's what it is, a gate support. Without it you couldn't function.

Mr. Cook: That will do.

Q. (By Mr. Cook): What is the extent of the use of the Smith valve by the industry?

The Court: There is a stipulation on that, Mr. Cook. The only question is how long has the Smith valve been in general use. That is the only question not stipulated.

Q. (By Mr. Cook): How long has the Smith valve been in general use in the pulp and paper industry in this country?

A. Well, we started making them before a Patent was issued, and during that period of time, which you know is during the depression, there

(Testimony of Walter G. E. Smith.)

were very few mills constructed, a few. But as soon as they started building those in 1936 Smith valves and Crane valves went [118] into practically every new mill built in the United States. Of course, then the war came on, and then there was no business again to speak of until the end of the war, and since that time a great many have been installed in the newer plants again, and, of course, to a certain degree in the old plants.

Q. Do you have any knowledge as to how many Smith valves have been put in use in this country?

A. No, thousands of them, thousands of them.

Q. Are they generally in use at the present time in new construction?

A. Yes, they are, a great many.

Q. Do reports from the Crane Company indicate the sale of great numbers of valves at the present time?

Mr. Buckhorn: That's stipulated on that, your Honor. [119]

* * * * *

Cross Examination—(Continued)

Q. (By Mr. Buckhorn): Mr. Smith, a considerable amount of your testimony on direct examination was with regard to a transverse wall which was incorporated in your particular valve. Is it not true that virtually every gate valve has a transverse wall incorporated in it?

A. Well, some of them would have two of them.

Q. Yes, but they all have one transverse wall at least, do they not?

(Testimony of Walter G. E. Smith.)

A. Every gate valve has to have one or two, yes.

Q. And is it not true that every gate valve has an opening on the outlet side of the gate in such transverse wall? A. That is correct. [121]

* * * * *

Mr. Buckhorn: Yes, that would probably be the better thing. I will withdraw the question. With the direct examination of my own witness I can probably bring out all those features since they have studied all of the details. One question I do want to ask Mr. Smith, and that is with particular regard to his experiences with the gate bending under pressure and in the particular modification valve which he constructed for installation at the Camas Mill having a round opening in the transverse wall. You stated in that case in the direct examination, I believe, that it was observed that the wall in that case had a tendency to bow and that the lower edge tended to cut away metal from the side at the bottom.

A. I think you misunderstood me, Mr. Buckhorn, I didn't say that Camas valve did that. I said other valves that I built experimentally showed some evidence of attrition at that point.

Q. What shape of opening did those experimental valves have in them?

A. Round ones.

Q. Round openings, and what was the shape of the gate that you provided in such valves?

A. The same as we have.

Q. A rectangular gate? A. Yes.

(Testimony of Walter G. E. Smith.)

Q. With a square bottom?

A. Uh-huh. [132]

Q. And you had a transverse wall extending upwardly from the floor of the valve substantially similar to the transverse wall as shown in L-prime?

A. Same as the notes. Just the same.

Q. Now I am speaking of Plate 1 which is the Plaintiffs' valve shown in the Smith Patent.

A. Yes, but you are referring to the one with the round opening, weren't you?

Q. I asked you if your valve which is the plate with the round opening in it had a transverse wall extending upwardly from the floor.

A. Precisely the same as the one with the V-shaped opening. The only difference is one was rounded slightly on the bottom, and the other is V-shaped.

Q. But you did say, I believe, that your experiment with those valves was to the effect that the gate did tend to bow under pressure?

A. The edge turned.

Q. The edge. Do you want to correct your testimony then which you previously gave to the effect that the valve tended to bow using a round opening?

A. Well, that's exactly—you would figure that the edge was bowed, wouldn't you?

Q. You mean by that the lower portion of the——? A. That is the knife edge. [133]

Q. That is the knife edge?

A. That's what we referred to.

(Testimony of Walter G. E. Smith.)

Q. Bowed in which direction?

A. Toward the seat.

Q. Toward the seat, and it tended to cut away metal from the seat?

A. We figured it would, yes.

Q. Did it actually do it?

A. There was some signs of attrition there.

Q. And that was avoided by changing the size of the opening to V-shape?

A. We never saw any more evidence of it when we did that.

Q. Pardon me?

A. I say, we never saw any more evidence after we did that.

Q. That corrected the difficulty then with it?

A. It appeared to, yes.

Q. I see.

A. Understand this, Mr. Buckhorn, let me make myself perfectly clear, that the treatment we gave those first valves experimentally were based on high pressures. We didn't ourselves realize that they would be subjected to much lower pressures than we had originally figured on. With our valves we tested around 125 to 150 pounds while the actual pulp mill pressure is rarely over 30 so it made a lot of difference.

Q. Yes, Mr. Smith, suppose that the lower end of your gate h as shown in Plate 1 were made of a V-shape substantially similar [134] to the bottom of the V-shaped opening. Would that gate be sup-

(Testimony of Walter G. E. Smith.)

ported equally as well as the gate which in its present form is shown rectangular shaped?

A. I don't think so.

Q. You don't think it would? A. No.

Q. Do you think it would bow under pressure?

A. It depends on how heavy you made it and what your pressures were.

Q. So that bowing, in order to prevent bowing of the gate under heavy pressure you would need the transverse walls portions marked at L-prime on Plate No. 1 to support the opposite sides of the gate?

A. We figured this would do it better than the round opening.

Q. Yes, all right then, I have no further questions.

The Court: What was the question before the last point when you were referring to Figure h, Plate 1, the question preceded by a statement that if it had been rounded it would have been different?

Mr. Buckhorn: No, if the bottom end of gate h as shown in Plate 1 were made of the same configuration as the V-shaped opening, if it were cut back at angles corresponding to the angles of the bottom, as to whether or not the gate would then be supported by the transverse wall and prevent bowing, and the answer was "No." [135]

Mr. Vosburg: I think he said would it be supported as well, and he said "no".

(Testimony of Walter G. E. Smith.)

The Witness: That's what you said, would it be supported as well.

Mr. Buckhorn: All right.

The Witness: And I said it would not.

Q. (By Mr. Buckhorn): Would it be supported at all by the transverse wall?

A. The end of it wouldn't from the points where it left the wall.

Q. That's right.

A. Certainly not, it would spring. [136]

* * * * *

HAROLD S. HILTON

recalled as a witness in behalf of the defendant, testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Buckhorn): Mr. Hilton, will you explain to the Court who designed the valve structure shown by the Defendant's Exhibit G, which is a split housing type of valve? A. Yes, I did.

* * * * *

Mr. Buckhorn: Oh, I did? Thank you very much. The bonnet type valve which is the one-piece housing which is marked as Defendant's Exhibit G. The question was as to whether or not [137] Plate 2 accurately portrays and illustrates the structure as incorporated in that particular valve? A. Yes, it generally does.

Q. And I believe you stated that you designed that particular valve? A. Yes.

Q. Then with regard to the next valve which

(Testimony of Harold S. Hilton.)

is the Defendant's Exhibit No. K, will you state who designed that particular valve?

A. That is the bonnetless type?

Q. That is the bonnetless type valve.

A. Yes, I designed that valve, too.

Q. And would you say that the plate of the Exhibit No. 3 accurately shows and illustrates the internal structure of that particular valve?

A. Yes. [138]

* * * * *

The Court: What number is the ring on Plate No. 3 that you are talking about.

The Witness: There is no ring shown.

Mr. Buckhorn: There is no ring shown in Plate No. 3. The ring, the renewable ring appears only in the blueprint of the Exhibit No. 3 which you have before you.

The Court: But the ring is inserted in the slot identified as 15?

The Witness: 15, the wall, the seat on the outlet side is machined to take the seat. The seat is a ring, and it is just pressed right in, especially when you have unlike materials like a mild steel body and you want stainless seat. You just machine the seat for the ring and press the ring into place. Then if you want to replace the ring in the seat you pull the ring out.

The Court: One ring goes all the way around, it's a full circle, [142] and the other is only a half circle?

The Witness: That is correct, and we only had

(Testimony of Harold S. Hilton.)

a removable seat on the outlet side, just a complete ring.

The Court: Oh, on the intake side is a half ring which is permanent?

The Witness: That is just part of the body.

The Court: And is the half ring part of the transverse wall?

The Witness: No, that is the wall of the inlet portion. The transverse wall would be the wall with the removable ring in it, which is the outlet half of the body or the seat which the valve gate bears against. [143]

* * * * *

Cross Examination

Q. (By Mr. Cook): I believe you testified that all of these gate valves required what you are pleased to call a transverse wall; is that true?

A. That is correct, on the outlet side they all have a complete circular seat.

Q. Some kind of a seating support there to support the gate? A. That's right.

Q. And in the structure shown on Plate 2 which, I believe, is the Exhibit O, the ring, the solid ring, the complete ring in that structure functions as a transverse wall; is that true?

A. That is correct, that is the seating ring on the outlet side of the bonnet type, yes.

Mr. Cook: That's all. [158]

* * * * *

PAUL J. THIESS

a witness called in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Buckhorn:

* * * * * [160]

Q. Mr. Thiess, I would like to ask you whether or not you have ever seen valves prior to December 3, 1930, which is the filing date of the application, which matured into the Smith Patent in suit, having grooves formed in the opposite side walls of the valve body and with the grooved flanged cut away on the one inlet side of the valve above the bottom of the floor?

Mr. Cook: If your Honor please, I object to the testimony as such. Let's have them in evidence so that we can look at them.

The Court: Objection overruled.

Mr. Buckhorn: You may answer the question.

A. I don't believe I have ever seen any valves of that nature prior to that time. I visited quite a few mills during the [169] years I was in Everett and also even at the time I was with Weyerhaeuser, and I don't recall anything of that nature.

Q. Mr. Thiess, I call your attention to the Hedrick Patent 988,777 filed or issued April 4, 1911. This is a copy of the patent which is included in the exhibits enclosed in the folder we mentioned. Mr. Thiess, did you see any valves of the type shown in the Hedrick Patent, or have you seen

(Testimony of Paul J. Thiess.)

any valves of the type shown in the Hedrick Patent installed in a pulp mill?

A. Yes, I have seen these quite frequently all the years that I have been connected with the industry.

Q. When was the first time that you saw a valve of that type installed in a pulp mill?

A. About two or three months after I went to Sumner Iron Works in Everett. That would be in 1929.

Q. In 1929?

A. Those type valves were being used in flow boxes and mold boxes at Everett and Puget Sound and some of the other mills that I visited at that time.

Q. Referring to the drawings of the Hedrick Patent, does that Patent show a valve which would be suitable for use in the pulp flow line in a pulp mill?

A. At a medium pressure range it would.

Q. And does this patent disclose a valve having a rectangular gate for controlling the flow through the valve orifice?

A. That is correct; it's a rectangular gate. [170]

* * * * *

Q. Have you ever built valves yourself or supervised the design and construction and installation of valves of the type shown in the Hedrick Patent in pulp mills?

A. Yes, I have at Everett, the Sumner Iron Works, the mold vats had regulating valves be-

(Testimony of Paul J. Thiess.)

tween the different compartments that had sliding gates of this nature, and the ones that we furnished Puget Sound were valves of this nature. At Longview Fiber in some of the head boxes and mixing boxes in both the ground wood [174] mill and the paper mill of my own design had plates of this nature. Only very recently at Publishers Paper I had a head gate for the refiner mixing box which had a gate of this nature which has openings at the bottom to expel any accumulation of stock.

Q. And then I want to repeat again because of the importance of it the date at which you first saw a valve of that type installed in the pulp flow box?

A. This type of valve?

Q. Yes. A. I would say in 1929.

Q. 1929. Would you say early part of 1929 or——?

A. No, it would be the latter part of 1929.

Q. Latter part of 1929, and such valves were substantially the full equivalent of this valve here with the exception of the cavities in, provided in the opposite side walls of the body ahead of the gate plate? A. That's right. [175]

* * * * *

Q. I would like to refer next to the Sumner Patent No. 1,379,136 dated May 24, 1921. Hand that to Mr. Thiess, please. Mr. Thiess, have you studied the specification and disclosure of this Patent? A. Yes.

Q. Will you please describe the structural ar-

(Testimony of Paul J. Thiess.)

rangement and operation of that valve to the Court?

A. The valve itself, body 22 carries the check valve portion 18, also runs in the guides, this main portion runs in the guides 15.

The Court: What figure are you looking at, 1 or 2?

The Witness: Figure 1. The guides 15 show up there. 18 is the principal casting which is shown in Figure 2.

Q. (By Mr. Buckhorn): 18 is the check valve and 16 is the gate? [182]

A. Oh, yes, I beg your pardon, I am wrong. 16 is the principal part of the gate, and the gate is raised in the valve bonnet similar to the other valves by stem operated by hand wheel 31. The gate has two seats, one for the check valve 18 which is an inserted seat 21, and the main body seats against the main portion of the valve body at 14.

Q. Mr. Thiess, you mentioned the check valve which has that round dome-shaped part 18 shown in all three of the figures 1, 2 and 3, and which part is hinged at the point 20. Will you explain the function of that particular element of the valve?

A. The normal inlet of the, of this valve would be 10.

Q. On which side, do you recall?

A. On the right-hand side of Figure 1.

Q. Pardon?

A. On the right-hand side of Figure 1.

(Testimony of Paul J. Thiess.)

Q. That would be the——

A. Inlet side of the valve, the stock pressure, the line pressure would open the check valve irregardless of what position the main—— [183]

* * * * *

Cross Examination

Q. (By Mr. Cook): Now, is there a housing which forms a recess in front of the [208] transverse wall or seating ledge of the gate which would be forwardly of the gate, that is, on the inlet side?

A. Yes, it shows a circular section of pipe. Is that what you refer to?

Q. No, isn't that the outlet side?

A. No, that would be the inlet side. The circular pipe would be on the inlet side.

Q. You are referring to pipe 1?

A. Right, you could use it the opposite way as far as the open valve is concerned.

Q. That is, it is your opinion that the section of the pipe 1 is the inlet for this valve?

A. I couldn't say definitely because I haven't read this complete so as to see whether that was his intention. He has springs provided to hold the gate in place so far small pressures it could be used in that direction.

Q. If the pipe 1 were intended to be the inlet for the gate, that is, it is so mounted that the pipe 1 is the inlet end of this structure, then the structure conforms somewhat in the same nature to the Patent, the Gill and Belfield, and the other Patents which you have before you where the flow of liquid

(Testimony of Paul J. Thiess.)

through the valve is in the reverse direction to what it is in Smith; isn't that true?

A. Yes. [209]

* * * * *

Q. Mr. Thiess, in Gill—well, let me come to this one general question and then I will go back to this. In the Gill Patent and [210] in the Patent to Belfield and in the Patent to Patterson which you have before you, this general question, that the flow of the liquid through those valves is in a direction opposite that in which the flow of the liquid is intended to be through the Smith Patent, or Smith valve; is that true?

A. It so states in the Patterson and the Gill Patents. I don't recall whether it's stated in the Belfield Patent. [211]

* * * * *

Q. (By Mr. Cook): Well, Mr. Thiess, can you point out in any of the prior art Patents which we have before us any adaptation of the Hedrick structure as shown in the Patent plans?

A. In what respect?

Q. Well, in the Hedrick structure you have a certain construction here of how a gate is mounted and operated, a certain construction with grooves cut away and a recess in front of it, according to your testimony. Do you find that in any of the other prior art patents which we have before us, and particularly the subsequent to Hedrick?

A. I am afraid I have lost your question now. Well, the Gill Patent certainly shows the recess.

(Testimony of Paul J. Thiess.)

The Patterson Patent shows recesses. The Sumners Patent has recesses underneath on the underside of that valve seat.

Q. Are those recesses on the inlet side of the valve in this Patent?

A. No, they are not, according to the flow shown. [223]

* * * * *

Q. Does the Patent to Gill disclose a wedge type gate valve? A. Yes.

Q. Now will you please read from the Patent beginning in Column 1 at Line 50?

A. "The inlet passage 3 correspondingly slopes upwards from its outer end to the seat 5," is that what you mean?

Q. Then will you read through to numeral 11 at the top of the next column.

A. "The outlet passage as a whole similarly slopes down to its outer end, but the lower part of said outlet passage is cut away [224] at 11."

* * * * *

Q. What would be your opinion as to the use for which the Gill valve is intended?

A. It would be intended for material which has heavy particles, as well as to convey the material in it.

Q. In your description of the valve in your testimony on direct examination did you describe the valve, considering the right-hand 4 as the inlet end? A. You mean did I?

Q. Yes.

(Testimony of Paul J. Thiess.)

A. I would so consider the valve should be installed and would be installed by most mechanics or pipefitters, and so forth, would use it.

Q. But at the time the Patent was issued or the Gill valve was developed somewhere between 1924 and 1927 I take it, apparently, it was the correct procedure to mount it the other direction, [225] wouldn't you say?

A. He so describes it, although I have never seen these Gill valves in operation,——

Q. Now the bevel on the bottom surface of the gate is intended to push the solid material to which end of the valve, the inlet or the outlet end?

A. It would be to the inlet end, the way I would install it.

Q. But according to Gill?

A. It's the outlet, according to Gill.

Q. Isn't it reasonable then to assume that he did not teach flushing that material into the flow from the inlet end?

A. It is possible. I don't think it greatly matters whether you have it on the inlet end or outlet end. When you open the valve the stuff is going to go on to some other point.

Q. Have you ever seen a valve like that shown in the Gill Patent in a pulp mill?

A. No, I don't believe I have. [226]

* * * * *

Q. Have you ever seen a valve like that valve shown in the Summers Patent or in use for controlling flow of the pulp stock in a pulp mill?

(Testimony of Paul J. Thiess.)

A. No, I haven't. [235] * * * * *

Q. Now referring to Letters Patent No. 1,179,-047 to Snow, granted in 1916, is that a wedge type valve? A. It's a wedge type nature, yes.

Q. Well, when you take away the fancy operating mechanism, that is, the worm and the rack and the like, you have little left but a conventional wedge type valve; isn't that true?

A. Except that the back guide does not extend the full length of the wedge, which is common in our ordinary wedge type. [241]

Q. Your groove for the gate extends all the way around the valve; doesn't it?

A. The guide groove, you mean?

Q. The groove in which the gate—if you notice Figure 1, the lower end of the gate does not have a number but it is adjacent to number 20.

A. Yes.

Q. The groove shown at (Y) (?) 1 in the Figure (Y) (?) 1 extends all the way around the body of the valve, the valve housing?

A. Well, it extends in a lower semi-circle.

Q. Well, it extends all the way across the width of the valve and apparently up the sides?

A. Yes.

Q. In other words, insofar as the tubing throughway of the valve is concerned, there is a groove all the way around that for the gate?

A. Yes.

Q. Have you ever seen a valve like that shown

(Testimony of Paul J. Thiess.)

by Snow in an operation in a pulp mill for controlling the flow of pulp stock?

A. No, I don't believe I have. [242]

* * * * *

Mr. Buckhorn: Your Honor, in connection with the Brooks Patent it will be recalled that defendants merely referred to the cutting edge, and it was introduced merely for the reason of showing that valves were old in the art prior to the date of the Smith Patent having a cutting edge on the lower edge of the gate plate, and no interrogation was directed to making any further comparison between the Brooks Patent and Smith, the plaintiffs' or defendant's valve. Obviously, they are otherwise entirely different structures. It would like—it would be like comparing the horse with the car. The differences are more or less obvious, but the only similarity which we pointed out was the cutting edge on the bottom of the gate.

Mr. Cook: It is your position, Mr. Buckhorn, that that is the only reason the Brooks Patent is cited, is to show a gate with a cutting edge? [246]

Mr. Buckhorn: That's precisely the only point which was asked on direct examination. [247]

* * * * *

Q. (By Mr. Cook): Referring now to the Belfield Patent, Mr. Thiess, 105,027, granted in 1870, which is the inlet end of the valve as taught in the Patent?

A. That I wouldn't know. I didn't read it enough to find that.

(Testimony of Paul J. Thiess.)

Q. What are the elements ff, and I direct your attention to the sixth line from the bottom of Column 1 of the Patent.

A. Sixth line from the bottom?

Q. Yes, sir. A. Yes, inclined ribs.

Q. What is their function?

A. To help guide the valve plate.

Q. What is the shape of the valve itself, the valve member?

A. The valve within has a round face and a sloping back, sort of a square top, the seat of the stem.

Q. It's a circular face to fit against the circular seat as provided by the inner end of the pipefitting D; is that true? A. Yes.

Q. And the rear face of the valve member or gate is wedge-shaped? A. Yes.

Q. Or inclined in order to be urged against the seat by those inclined ribs; is that true?

A. Yes.

Q. Is that the function of the inclined ribs, is to engage the [250] inclined back face of the valve member and urge it into engagement with the valve seat? A. Yes.

Q. There would be little contact between the valve itself and the inclined ribs until the valve was practically in seating position, would there?

A. That's right.

Q. Is there any teaching in the Belfield Patent of a recess beneath the ribs?

A. I don't know. I don't know.

(Testimony of Paul J. Thiess.)

Q. Considering the inlet end as supplied by the pipefitting D which is the valve seat, if there were a recess it would be on the outlet side of the valve seat; is that right? A. That's right.

* * * * *

Q. Let's go on the Patent to Patterson, please, 985,444, issued in 1911. In that valve which is the inlet end of the valve?

A. According to the Patent it's the D, in Figure 1. [251]

Q. In Figure 1? A. In Figure 1.

Q. D, you testified that there were grooves in this Patent formed by the gibs K. What is the function of gibs K in the Patent?

A. The gibs K is to help retain the valve guiding it towards the seat.

Q. In the same manner as the inclined ribs f in the Belfield Patent? A. Yes.

Q. And that horizontal line in Figure 1 beneath the letter K indicates that the shoulder k disappears into the side wall of the valve; is that true? A. That's right.

Q. And it was your testimony that beneath that shoulder in the area of the letters h and r in Figure 1 was a recess, is a recess?

A. That's right.

Q. Your testimony, I believe, during cross examination is that that would be an area of low pressure in the operation of the valve as shown in the Patent and that there would likely be an accumulation of pulp at that point; is that right?

(Testimony of Paul J. Thiess.)

A. Yes, sir.

Q. Have you ever seen a valve of this nature in use in pulp mills for controlling flow of the pulp stock? A. I don't believe so. [252]

Q. Refer to the German Patent Heinecke. Which is the inlet end of the valve?

A. I don't believe the Patent states.

Q. Does the groove in which the gate seats extend all the way around the floor of the valve?

A. Yes.

Q. Is this wooden model a true reproduction of the valve?

A. A representative production, reproduction.

Q. The date of the Patent is 1881, I believe, and if we were to follow the teachings of the other Patents of record in this suit we would assume that the inlet end were on the end opposite those little recesses e, wouldn't we?

A. You mean on the right-hand side?

Q. These little recesses e in the Patent would be on the outlet side of the valve?

A. Yes, sir. [253]

* * * * *

Q. (By Mr. Cook): Mr. Theiss, is the Heinecke valve any more or less than a quick opening conventional type gate valve with three small flaring cavities in one wall of the groove?

A. It is distinctly different than the conventional type gate valve because it has these cavities which excludes the stock which come onto the blade, is very definitely set out in the Patent.

(Testimony of Paul J. Thiess.)

Q. Yes, I know it has three small half shaped openings which connect with a groove, but other than those V-shaped openings is there any difference between this and the ordinary gate valve?

A. No.

Q. That is the only difference in structure of this valve from a gate valve is that it has those three small openings in the side of that groove?

A. And three cavities as shown. [254]

* * * * *

Redirect Examination

Q. (By Mr. Buckhorn): Do you wish to correct any testimony that you may have made inadvertently or otherwise earlier upon cross examination as to the normal direction of liquid through a valve gate of that type?

A. Yes, because I looked at this in the manner in which this type of valve is used in some of the flow boxes, in which particular case we operate them from either direction and generally from the, from what is the outlet side of this pipe.

Q. Pardon me?

A. In flow boxes we operate a lot of them so that, normally, the inlet would be the pipe part of this.

Q. I see, but referring back to the questions which I have put to you upon direct examination of the other evening in which you stated that you had seen valves of the type shown in the Hedricke Patent installed in a mill, I believe in Everett, Washington in 1929, in which direction was the,

(Testimony of Paul J. Thiess.)

no, in which direction did the fluid flow through those valves which you saw installed in that year?

A. I would have to picture myself the vat box as it is constructed. It would be the opposite to this. [260]

* * * * *

M. L. EDWARDS

was thereupon produced as a witness on behalf of Plaintiffs, in rebuttal, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cook:

* * * * * [272]

Q. I should like to supply you with a pad of paper and ask that you describe for the Court the operation of valves which control the flow of pulp in a pulp mill.

A. Well, I am a little bit cold in this case. I don't know what has been said before in the way of the nature of paper pulp as a material being handled, but, if it is in order, I would like to preface what I am saying about valves by a little statement about that.

Mr. Cook: Perhaps I might explain to the Court that Mr. Edwards has been in Cleveland, Ohio, up until last night and just arrived—no, midnight Wednesday, and he has just arrived in this part of the country, and does not know what has gone ahead up to this time in this case.

(Testimony of M. L. Edwards.)

The Court: He can make any preliminary statement he wants to make.

A. Thank you. Pulp fiber is extracted—the fiber I am speaking of now is extracted chemically from wood, and actually the fiber used in the Northwest averages probably one-thousandth of an inch in diameter and from a sixteenth to an eighth of an inch long. These fibers, in the process, are handled in solution, in water—it is mechanically mixed, as between the fibers and water. The fibers, being in suspension, are inclined to tangle, become blocked. In the handling of fiber pulp in water the fibers will cling to a sharp edge. It is the nature of these [275] fibers to form a mat very easily, and when the fiber pulp tries to flow through a small opening the tendency is for these fibers to collect in clusters and bridge the gap.

After this gap has been bridged, the fibers themselves act as a filter to allow water to pass, but the fibers collect back of this dam that is formed by the fibers themselves and build up a heavy plug of pulp ahead of the small opening.

Q. (By Mr. Cook): Mr. Edwards, the present case involves the use of the Smith valve. Are you familiar with the Smith valve?

A. I believe I am, yes.

Q. As used in pulp mills for controlling the flow of paper pulp? A. Yes.

Q. I should like to have you explain to the Court, if you will, just how these valves are used in pulp lines?

(Testimony of M. L. Edwards.)

A. Well, of course, a valve can be used at any time in a pipe line in which pulp flows where sometimes it may be necessary to shut off the flow, but a very common place is to use one on both sides of a pump in a piping system, where the pump may have, sometimes, to be isolated from the system for repairs, without emptying the pipe line or the tanks on either side of the pump.

Q. Could you sketch for his Honor a typical installation of this type of valve?

A. Well, I will attempt to sketch it. The pump, of course, is connected to the bottom part of the tank. A valve is placed between the pump and the tank. Then, on the discharge side of [276] the pump another valve would be located and then, leading from that valve, up away from the pump to some other place in the system, the pipe line is connected.

Q. Are these valves here that you have indicated valves of the type as shown in the Smith Patent?

A. The Smith valve would be very applicable to that kind of installation, yes.

Q. By the way, Mr. Edwards, do you know of the problems that confronted the pulp industry at the time Mr. Smith produced the Smith valve?

A. Well, I believe his valve came on the market about the same time or possibly a little before the time that I became connected with that industry. I am not sure of the date. I heard about his valve after I had been in it a little while. I think it was around the beginning of the '30's. That is

(Testimony of M. L. Edwards.)

the time I became aware of the valve existing.

Q. Do you know what the problems were that that valve was supposed to solve? A. I do.

Q. Will you please state them?

A. Well, when paper pulp is—as an example, I have illustrated it here. When paper pulp is being pumped through a line, it is frequently necessary to shut the pump down and, on doing that, the valves on both sides of the pump are closed. Then it is [277] possible to open the pump for repairs. In that time the pipe line above the pump may be left—may remain full of paper pulp, and during those times the pulp that remains in the line—in case of a small leak through the valve, the water would drain out of the pump line, leaving the pulp in the line.

I have seen times when that has occurred, with pulp that happened to be in the line at the time the pump was shut down—the water will drain through, as I said a while ago, and the pulp will de-water, and leave all the fibers in a heavy plug above the valve.

I have seen pulp gathered in this manner become so heavy you would have to go in with a crowbar and dig it out.

I have seen it necessary to dismantle the pipe in order to remove plugs of pulp. Of course, that is a pipe-line problem, but the valve is near where the problem occurs.

The features of the Smith valve are its ability

(Testimony of M. L. Edwards.)

to open and close when these heavy plugs of paper stock occur in the valve itself.

Frequently, when a valve is left closed on a line like this, a small amount of leakage occurs, not to the extent I mentioned a moment ago, but a small amount of leakage occurs where the fibers close to the valve are forced by the pressure in the line into the small passages around the valve plate, and it becomes a very heavy plug there and makes it difficult to remove the valve. [278]

If the valve should be left open very slightly, the plugs will form at that opening and the fibers will extend through the opening.

The features of the Smith valve are to, not prevent this forming—of course, that could not be done—but to make it possible at the time the valve is closed to shear off this pulp that is in the way, and then in the grooves or slides at the side of the valve plate—where the plugs occur there are grooves that the valve plate slides in, which are open at one end so as the valve moves these plugs will be forced out into the open space rather than having to be held confined in the groove that does not have an opening for them to get out. [279]

* * * * *

Mr. Cook: Defendant's Exhibit B-4.

Q. Does that patent disclose a gate slideable between ports?

A. I can see in Fig. 1—this patent is entitled "Head Gate." I can see in Fig. 1 and Fig. 2

(Testimony of M. L. Edwards.)

what looks like a gate operating against one port; it would not be plural—one port, not two.

Q. It is a gate closing a single port, is that right? A. That is the way I see it.

Q. Is that type of structure used in a pulp mill?

A. Well, it could be. Yes, I know of cases where it is used; however, not exactly this arrangement.

Q. Where are head gates of this nature used in a pulp mill?

A. The instance I was speaking of is in what we know as a head box or mixing box, commonly used at the head of certain paper mill machines, pulp mill machines. The gate I am thinking of is used in the opening of the wall of a tank, where the flow occurs from one part of the tank to another, and the tank has different compartments in it, and the gate would open and close this aperture in the partition in the tank or in this box. There would be one port involved. That is in answer to your question, I believe.

Q. Then it is simply a closure member for opening in the wall between two compartments in the tank, is that correct?

A. That is right, yes. [280]

* * * * *

Q. The question is: Can you describe for the Court or explain to the Court the essential difference between the head gate such as shown by Hedrick and the valves shown in the Snow, Summers and Gill Patents?

(Testimony of M. L. Edwards.)

A. These are all to be placed in pipe lines where the pipes will be on both sides of the valve, while in the case of the head gate—that is an opening to open a flume, or the open box, an open box of some kind to a pipe. One involves one purpose and the other involves two purposes.

Q. Would you say that the valves shown by Gill, Summers and Snow involve a gate slideable between two ports, whereas the Hedrick Patent shows a valve closing a single port?

A. It certainly is evident in Plate 4 the valve is slideable between two ports, I would call them, and, in Plate 5, I see two ports—they are in little different proportions—and in Plate 6 I think there are two ports there. Yes. [282]

Q. Mr. Edwards, referring to Plate 4, which shows the drawings of the Gill Patent, could you say from an examination of the drawings which is the inlet port?

A. Well, if I were applying a valve of that kind to a pipe line, I think the port to the left would be the inlet port.

Q. That is the port 3? A. That is right.

Q. And would you say why you would apply it in that way?

A. Well, when the valve is open, of course, it would not make any difference; but when the valve is closed, when it is frequently important to do repair work on the packing box through which the valve stem goes, using Fig. 3 as the inlet on the left, when the valve is closed it would be possible

(Testimony of M. L. Edwards.)

to open up the packing box and repair it, because it appears that the sealing of this valve all takes place on the port to the left, next to that of the inlet 3, what I call inlet 3. Also, during times when the valve is closed the packing would not be subjected to pressure when the valve is closed against it and the packing would not be subjected to pressure during the time the valve is closed, and it might prevent leakage if that is so important, and it can be in many cases.

Q. Then it is your opinion that there is a sound reason for the sealing, sealing the pipe against the flow of fluid through the inlet 3?

A. Yes. Later—this is 1927—standard gate valves had [283] closure on both sides, that of course left the packing boxes free from pressure in either direction.

Q. Do you know whether or not it was conventional practice, ahead of 1930, for example, to construct valves with the gate so mounted as to seal the valves or close the valves against pressure of the inlet fluid, as in the Gill Patent?

A. I think, as I remember it, in valve construction at that time it was quite standard practice to close the valves, if I get your question correctly, so that when the valve is closed the packing box was free from pressure. Is that your question?

* * * * * [284]

Redirect Examination

By Mr. Cook:

Q. Mr. Edwards, continuing for a moment with

(Testimony of M. L. Edwards.)

your discussion of the Gill Patent, the similarity of the seats 5 in the Gill Patent and the ring 15 in Defendant's Plate 2, your testimony that the seats are similar was simply a matter of structure, I take it, that one seat is like another seat?

A. That is what I mean, yes.

Q. In the valves as a whole is there a similarity or dissimilarity in those seats?

A. Well, I explained a while ago that there is dissimilarity in the nature of the ring type and the angle of approach there for performing a tight closure. I don't know just the object of these grooves on the back side of the Gill——

Q. With respect to the direction of flow through the Gill valve and through the valve shown in Plate 2, the direction of flow on Plate 2 being shown by an arrow so that there would be no question about the direction of flow there; is there a similarity or dissimilarity in the way those valves operate?

A. Well, I am not sure I understand the differences between all these different kinds of similarities you are talking about. I want to give the best possible answer I can.

Q. In the Gill valve it is true, isn't it, that the valve 7 is seated against the flow of liquid entering the valve, in its normal operation? [296]

A. The valve 7 seats against the flow of liquid, fluid, yes.

Q. And the opening in the wall 6, the cutout portion of the floor of the valve, and the small cut-

(Testimony of M. L. Edwards.)

out portion 15 around the discharge side of the valve, is that true?

A. Well, they would be on the discharge side of the valve if the flow went through the side 3 to side 4, yes.

Q. Whereas, in defendant's Plate 2, the cutout portion in ring 16 leaves a gap 18 on the inlet side of the valve, is that true?

A. According to the arrow indicating the direction of flow, that would be on the inlet side, yes.

Q. I believe it was your testimony on previous direct examination that a practical manner of mounting the Gill valve was so that the inlet flow came into the valve through the port 3, is that correct?

A. I said if I were mounting the valve under ordinary circumstances—I am familiar with the problems of valves in many cases—it would be right to mount it in that direction to gain accessibility to the parts of the valve while the valve is shut off.

Q. Mr. Edwards, referring to the Smith Patent, your previous testimony, I believe, was that the gate operates to clear these grooves of accumulation of pulp which may get in these grooves, due to the fact that there might be leakage around the edge of the gate? A. That is right. [297]

Q. I take it you were talking about a situation, as shown in your sketch, which would occur when the pulp filled up on the discharge side of the valve

(Testimony of M. L. Edwards.)

and the water had a tendency to leak back, is that true?

A. That is right. Of course, the shearing action would occur across the small openings in the valve, no matter on which side the plug would occur. The same thing would happen no matter which way the pressure happens to be across the valve, and if the pressure happened to be in reverse from the direction I was mentioning a while ago, this leakage problem would be more inclined to occur, but it would shear any pulp that might close the gap, even if the fluid flowed in either direction.

Q. I think that had not occurred to any of us before your testimony, but is that one of the reasons for the popularity of the Smith valve?

A. As far as I know, it is, yes.

Q. In that, if there is an accumulation of pulp in these grooves, because of the back flow and back pressure, then the operation of the gate will clean those grooves?

A. That is right. I am speaking about the opening when the pulp occurs, forms through an opening in the valve itself, it will shear it off down at the bottom of this V here, yes. [298]

* * * * *

STANLEY WILLIAM ST. GEORGE

was thereupon produced as a witness on behalf of Plaintiff, in rebuttal, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cook:

* * * * * [299]

Q. (By Mr. Cook): Mr. St. George, can you explain to the Court the basic differences between a gate such as shown in the Hedrick Patent and the valve as exemplified in the patent before the Court in this suit?

A. The term "head gate" is commonly used to denote a head gate for the control or shutoff of gravity flow in a flume or ditch, such as used in irrigation, to allow a spillway to become operable or closed off to control the level of the water behind the pump.

With a dam you haven't only the head gate to control the overflow from the dam, but you have a penstock or a pipe line coming from the bottom of the dam, conducting the water under pressure to possibly a turbine. In those penstocks or pipe lines you have a valve.

The valve is a completely enclosed structure so that it will maintain pressure in the line both on the inlet side and outlet side of it, if the outlet does not drop the gravity.

A head gate of the type of the Hedrick Patent, or in the form of a head gate, if the pressure would

(Testimony of Stanley William St. George.)

increase on one side the flow would pile over the top of the gate. In other words, if the gate was closed and the pressure increased in the flume, it would throw the water over the top, like you would in a regular dam put in a ditch.

There is a difference between a structure known as a head gate, which is normally classified as gravity control, and a valve that is commonly designated as pressure control, one [309] being a plug in the line of a flume under pressure and the other being a dam or obstruction in the flow line. That would be my definition.

Q. Mr. St. George, is there an essential difference between a structure such as shown by Hedrick and the valve disclosed in this patent?

A. Essentially, I think, the same explanation I gave of a liquid being confined under pressure would cover that.

Q. Please refer to the Gill Patent, Defendant's Exhibit B-2 which is shown on Plate 4 of Defendant's Exhibit D.

In the Gill Patent—would you say the cutout portion in the wall 6 of the Gill Patent,—that is, the wall on the discharge side of the valve,—serves identically the same function as the cutaway portion of the ring 16, I believe it is, in Plate 2?

A. It is my impression that with the single-wedge type of disk shown in this Gill Patent the flow would come from the left-hand side going towards "B." On a single-wedge disk valve that is the way I would install it.

(Testimony of Stanley William St. George.)

These little cutaway portions, I would say they would be on the downstream side or away from the flow. The cutaway portions shown in Plate 2 here are on the inlet side of the valve. Primarily, they are both openings in the seat, not in the seating surface but in the port surface there.

Q. Can you tell me which is the inlet port of the Gill Patent, of the valve shown in the Gill Patent? [310]

A. If I was to have charge of installing this particular valve, without any instructions, I would put the pressure or inlet side at A-3 there.

Q. Why do you make that statement?

A. I would like to take just a half-minute to explain the wedge gate valve, if I may.

Q. What type of valve is the Gill valve?

A. It is a wedge gate valve, a single-wedge gate valve.

Q. Will you explain to the Court what you mean by a single-wedge gate valve?

A. Prior to about, I would say, 1912 or 1914, practically all gate valves, wedge gate valves, were single-wedge on one side or the other of the valve disk. I would say there were very, very few valves of any other type manufactured. That was due to the fact that they did not have accurate production machine tools which were developed during the first World War.

The production of a single wedge, and its mating surface, was comparatively simple, but the production of a double surface and its double-wedge seat-

(Testimony of Stanley William St. George.)

ing surface became a very big problem, so that prior to that time practically all manufacturers of valves produced only the single-wedge disk. It was standard practice prior to a long time before I entered the business to install those valves with the tapered wedge section on the downstream side.

From the advent of the double-wedge disk valve, the [311] valve being wedged on both sides, this type of valve, double-wedge valve, can be installed in a line with the inlet port in either direction,—it doesn't make a bit of difference,—and still does not make a bit of difference, but standard practice and standard usage throughout all the years was with the tapered section of the valve being installed on the downstream side, and you will find yet today thousands of them installed in that manner.

Q. You say the tapered section or tapered face of the valve is on the downstream side?

A. That is right. [312]

* * * * *

Q. Will you please refer to the Belfield Patent which is Defendant's Exhibit C-1.

Will you please indicate which is the intake port of the valve shown in that patent?

A. This again is a typical single-wedge gate valve with slight modifications as to the design of the body.

Under normal and standard practice the flow in that valve would be from left to right, as shown in Fig. 1, and from left to right as shown in Fig. 2, likewise in Fig. 3.

(Testimony of Stanley William St. George.)

Q. Will you please describe the function of the valve to the Court, how this valve operates.

A. The valve disk itself is raised and lowered by a threaded [316] valve stem B. It is raised in its bonnet and the flow line comes through the valve in this manner (indicating). Cast in the side of the valve body on the downstream side of the seat are ribs on both sides. They are designated as f-f, and they are on an incline. The back side of the valve is inclined at the same slope as the ribs f-f so that when the valve comes down the wedging effect of the inclined plane of the back of the valve and the ribs match and the valve is shoved by its wedging action upstream and against the valve seating surface which is A. Where the two planes come together, they are forced forward by the pressure, forcing the disk towards the upstream side and seating the valve—I think that is D—against the seating surface A.

Q. I note that there is a clearance between the valve B when it is in closed position. Would you state the reason for that?

A. In a single-wedge disk-type valve, and also in modern double-disk valves, the valve operation gradually releases the seating surface—in this particular valve the ribs f-f—which allows the valve to drop more and more towards the bottom and wear takes place.

Q. You mean towards the bottom of the casing?

A. Towards the bottom of the casing. Therefore, if natural wear takes place, eventually the

(Testimony of Stanley William St. George.)

valve disk itself will hit the bottom and the valve will no longer be tight, because there is no further wedging action left. That space, when a valve is new, [317] is left there to take care of wear at the surface.

The Court: Are you going to ask anything more about this valve?

Mr. Cook: Just a question or two, your Honor.

Q. Is there good reason why any valves, such as shown in the Belfield Patent—and I mean this type of valve, single-wedge valves—is there any good reason why the valves are seated in opposition to the flow of the liquid through the valve? Is there a good reason for that?

A. The reason is that it is always desirous to force your valve against its seat in a single-wedge type of valve. That is the principle involved in it, to force your disk into tight contact with its seat.

Q. Why don't you employ the pressure of the liquid to seat the valve rather than wedge it against the seat against pressure of the liquid?

A. In that case your wedges would not be needed in any form at all. You could rely on pressure to hold it there, and if there was any slight amount of viscous liquids that would get on there, it would be held away from its seat and you would have consequent leakage.

Q. To mount them otherwise would affect the pressure of the line? A. Yes, it would.

Q. Would that be a practical method of operating these valves? [318]

(Testimony of Stanley William St. George.)

A. No, sir. As I stated before, the conventional and accepted practice of single-wedge gates has always been to place them with the pressure against the face of the valve and the wedging effect on the downstream side. I say, that is the conventional practice.

Q. Are these valves mounted tightly on the valve stem? Are they mounted rigidly on the valve stem so that they move rigidly into position?

A. No. There is always a certain amount of looseness between the valve and its valve stem.

Q. If pressure were behind the valve, as an aid to seating the valve, would there be any likelihood of the valve rocking on its support?

A. That would happen many, many times where the valve was installed with the flow on the downstream side against the back of the valve, and, as I explained before, the looseness of the valve disk itself, swinging on its stem as it comes down, with the pressure on the back side of it, the disk can, in some cases, swing over far enough on the bottom that it will lodge itself on the top of the seating ring and jam itself open. That has happened many times. [319] * * * * *

Q. Mr. St. George, Mr. Edwards expressed the opinion that valves of the structure in the Gill Patent and the Belfield Patent would not be useful in a pulp mill for controlling the flow of stock. Do you agree with that opinion? Would you please give him Defendant's Exhibit B. Do you have that?

(Testimony of Stanley William St. George.)

A. Yes, I have it now. In the Gill Patent, which would be comparable to any single-wedge type gate valve, when the valve is open there is a cutout between the valve disk and the seat on the upper side which allows products being conveyed in the line to enter the upper chamber of the valve body into which the valve itself has withdrawn.

In the event the valve was left open for a considerable time, without being closed, it is entirely possible that that cavity could fill up full of material and clog the valve so it would be difficult to shut. [320]

* * * * *

In the Smith valve the gate itself projects completely through and to the outside of the body of the valve.

Q. That is correct. In other words, if the stuffing box in defendant's structure were filled up with pulp, nevertheless the gate extends out through that pulp and out through the stuffing box so it could not be kept from opening?

A. Not by material lodged above it, like it could in the Gill valve.

Q. Is that not also true of the Smith Patent?

A. It is true in that type of valve, yes.

Q. In other words, no pulp can get over the top of this gate?

A. Over the top of the valve disk itself.

Q. That is why the Gill Patent, the Belfield Patent, and that type of patent could not be used in pulp operation?

(Testimony of Stanley William St. George.)

A. Could not be used successfully; yes, that is right.

Q. But Mr. Smith, in devising this valve, provided a valve whereby deposits of pulp in the bonnet could not affect the operation of the gate, is that true?

A. A deposit of pulp above the gate could not happen in a valve of that structure, where the valve plate extends to the outside surface of the valve.

Q. By "that structure" you mean the Smith Patent or defendant's valve? [323]

A. Yes. [324]

* * * * *

Q. Will you explain briefly to the Court the operation of the valve shown in the Patterson Patent?

A. The flow is indicated in this valve coming from right towards the left. Primarily, it is a modification of a single-wedge gate valve, having an inclined plane on the downstream side of the valve disk which meets an inclined plane in the valve body so that when the valve is closed it meets—when the valve is closed into a closed position it meets an inclined plane, and forces the valve against its seating surface F. I believe the seating surface of the valve is labeled "G" here. The valve is [325] suspended from a screw stem, which will pull it back up into the recess which I assume the letter "B" means, "L" being the screw that raises it up or lowers it.

The inclined plane, as I said before, forces the

(Testimony of Stanley William St. George.)

valve into a closed position against the upstream pressure, against the seat here. The clearance which is left in the valve is to compensate for and allow clearance for wear on the slope of the two wedging surfaces. Otherwise the valve would hit the bottom and, sometime in the future,—would hit the bottom after a slight amount of wear takes place there.

Q. Would you say that there is a recess in the valve shown by Patterson comparable to the recess in the Smith valve? A. I would say no.

Q. The recess in the area indicated by reference to the letters "H" and "R" in Fig. 1 of the patent, are they structurally or functionally the equivalent of the recess in the Smith Patent, right beneath the valve?

A. I would say no, that they are not.

Q. And for what reason?

A. That recess there, the "R," is to allow space for the machining of the valve face. It is to allow tools to go in there and machine that surface.

Q. If you have a flow in the direction as indicated by the arrow "G," then the recess beneath the valve would not be in the same location as in the Smith Patent, is that true? [326]

A. That is right.

Q. I would like to have you turn to the German patent to Heinecke, Defendant's Exhibit C-12.

Is there any indication in the patent to Heinecke on which side of the valve are the cavities?

A. No indication on the drawing which way

(Testimony of Stanley William St. George.)

they would go, or which side these cavities would be with relation to the flow.

Q. Is there any given in the descriptive matter?

A. My interpretation of this—this is supposed to be a literal translation of the German patent itself?

Q. We have accepted it as such.

A. There is one sentence here by which my interpretation would be that the cavity "e,e,e" was on the downstream side. This is in Paragraph 2, the fifth line: "Besides, the valve is provided with cavities e,e,e in this case so that through them the thick fluid can escape from the valve seat upon the closing of the valve."

Q. Do you find similar cavities in the Gill Patent? If you will, please, refer to the Gill Patent, Defendant's Exhibit B-2.

A. I don't seem to be able to find it. Those cavities shown in the Gill valve are comparable, and they are also on the downstream side.

Q. What is the reference numeral?

A. I believe that must be 15 that shows the cavity. [327]

* * * * *

Q. I hand you a plastic and wood model of defendant's valve, which is Plaintiffs' Exhibit 7, and ask you if you find in that model a recess or cavity in the walls of the intake port, the inlet port, comparable to the cavity M shown in the Smith Patent?

A. Using this model here, in the Smith valve the

(Testimony of Stanley William St. George.)

difference is that one valve has a rounded bottom for its seating and the Smith valve is rectangular in shape in the bottom of its disk, or squared. [329] Both valves have a relief area which, in turn, are very much alike. I think in operation they would probably function exactly alike.

Q. In the Smith Patent, or the Smith valve, the recesses M, shown in Fig. 5 of the patent, are for what purposes? First, where are they located?

A. They are in the bottom and side of the inlet port.

Q. With relation to the grooves in which it slides? A. At the bottom of the groove.

Q. They are for what purpose?

A. When material is sheared down, during its travel downward, it is to allow the knife edge to cut the side of it as it reaches the bottom and force it in the direction in which the flow is coming, being held up away from the bottom and forming a cut-off seal there.

Q. There is what the Smith Patent refers to as a recessed gate in the floor on the intake side of the valve. Do you find that? I think you will find that also in Fig. 5. A. Fig. 5?

Q. Yes. Can you find the recesses, please?

A. I don't believe I do. Oh, yes. I see it now. Excuse me.

Q. Turn to Page 2 of the Smith Patent.

A. Yes.

Q. Would you read the paragraph beginning with Line 16, on Page 2. [330]

(Testimony of Stanley William St. George.)

A. It says, "Further, the grooves g in which the gate h is slideable are cut away as at m at the bottom on the inlet side, down to the inclined bottom surface j. See Figs. 1 and 5; thus any stock that has accumulated in said grooves is scraped off by the edge of the gate and discharged on to the bottom surface or floor of the housing and carried away with the next flow of material through the gate valve."

Q. Do you find a comparable structure, a similar structure, in defendant's valve, as exemplified in Plaintiffs' Exhibit 7?

A. The basic principle is identically the same, to my way of looking at it.

Q. Is there a recess or a cavity—the words used in the patent—in the wall of the valve casing here (indicating)?

A. It is relieved at the start of that circle, the section here (indicating), to arrive at a cavity form.

Q. Why would it be recessed at that point?

A. I think basically for the same reason as the rectangular disk is relieved in order to force any material down and back into the line of flow. That would be my impression.

Q. In other words, it is your opinion that the relief there, called a cavity in the Smith Patent, is exactly for the same purpose as a valve?

A. The principle is identically the same. [331]

* * * * *

Q. (By Mr. Cook): Is there a relieved portion in the wall of the inlet housing by reason of its

(Testimony of Stanley William St. George.)

shape to conform to the shape of the housing at the valve seat?

A. In the model here I would say it would be awfully hard to judge whether there is relief there or not, but in the drawing of the valve it definitely shows a portion of the upstream seating ring cut away to do that, to achieve that effect.

Q. On the floor down here is an actual Fabri valve. Lest there be some complaint that the model is not a true and correct model, [332] I would like to have you step down here and examine the actual valve.

At the point where the grooves terminate in the valve is the triangular portion of the valve relieved so material from the grooves can be pushed with the flow?

A. The upstream seating surface of the disk is stopped just a little below that line—I am unable to see how this is constructed, whether it is cast steel or what—allowing free access there for any material to be shoved towards the upstream side, by the wedging action of the cutaway portion of the disk.

Q. Then it is your opinion that the function of that portion of defendant's valve is exactly the same as the function of that portion of the Smith valve?

A. The same principle, identically. [333]

* * * * *

Cross Examination

Q. (By Mr. Buckhorn): You would not say

(Testimony of Stanley William St. George.)

that the valve, as shown in the Gill Patent, could be connected in a flow line with the end B to the supply?

A. It could be, but it would be installed wrongly, for two reasons: One is that the valve itself is swinging loosely on the end of its stem and with pressure on the far side, against the back side of the valve, with the flow coming towards it, it would be entirely possible in that valve to get enough downstream movement as to cause the valve disk to impinge itself on the valve seat, stopping it from closing, and that is generally true of so many of the single-wedge type gate valves that are installed backwards. [343] * * * * *

[Endorsed]: No. 14422. United States Court of Appeals for the Ninth Circuit. The United States National Bank of Portland, Oregon, Trustee, and Walter G. E. Smith, Appellants, vs. Fabri-Valve Company of America, a corporation, Appellee. Fabri-Valve Company of America, a corporation, Appellant, vs. The United States National Bank of Portland, Oregon, Trustee, and Walter G. E. Smith, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Oregon.

Filed: July 12, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14422

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH,

Appellants and Cross-Appellees,

vs.

FABRI-VALVE COMPANY OF AMERICA, a Corporation,

Appellee and Cross-Appellant.

STATEMENT OF POINTS ON CROSS-APPEAL, AND RESERVATION OF RIGHT TO DESIGNATE PORTIONS OF RECORD

Fabri-Valve Company of America, appellee and cross-appellant in the above-entitled action, states the following as its points on appeal:

1. The District Court erred in holding claim 3 of the Smith patent infringed by defendant's gate valves.

Reservation: Fabri-Valve Company of America, appellee and cross-appellant in the above-entitled action, reserves the right to designate portions of the record within ten days of service of appellants'

and cross-appellees' designation, as provided in Rule 17(6).

/s/ ORME E. CHEATHAM,
Of Attorneys for Appellee and
Cross-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed July 20, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL, AND DESIGNATION OF RECORD BY APPELLANTS AND CROSS-APPELLEE

Now comes The United States National Bank of Portland, Oregon, Trustee, and Walter G. E. Smith, Appellants and Cross-Appellees in the above-entitled action and adopts as the points of appeal upon which they will rely on appeal those points contained in the Statement of Points filed in the District Court of the United States for the District of Oregon and included in the certified Transcript of Record.

The above named Appellants and Cross-Appellees designate those portions of the record as filed in the District Court of the United States for the District of Oregon and included in the certified Transcript of the Record as those portions upon which it will

rely in support of its Statement of Points on Appeal.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, Trustee, and WALTER G. E. SMITH
Appellants and Cross-Appellees
By COOK AND SCHERMERHORN,
/s/ By HAROLD D. COOK,
Of Attorneys for Appellants and Cross-Appellees

Acknowledgment of Service attached.

[Endorsed]: Filed July 22, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION BY APPELLANTS AND CROSS-APPELLEES AND BY APPELLEE AND CROSS-APPELLANT AS TO DESIGNATION OF RECORD

Comes now The United States National Bank of Portland, Oregon, Trustee, and Walter G. E. Smith, Appellants and Cross-Appellees, and Fabri-Valve Company of America, Appellee and Cross-Appellant in the above entitled action, and stipulate and agree that the following portions of the record as filed in the District Court of the United States for the District of Oregon shall be designated to constitute the record on appeal:

A. To constitute the written record:

1. Complaint.
2. Answer.

3. Pre-trial Order.

4. The following designated portions of the transcript of testimony and proceedings at trial before Honorable Gus J. Solomon, Mar. 28, 1951: * * * *

5. Opinion of Honorable Gus J. Solomon, dated December 31, 1952.

6. Opinion of Honorable Gus J. Solomon, dated June 17, 1953.

7. Findings of Fact and Conclusions of Law.

8. Judgment.

9. Notice of Appeal by Plaintiffs-Appellants.

10. Plaintiffs' Undertaking on Appeal.

11. Notice of Appeal by Defendant-Appellee.

12. Supersedeas Bond of Defendant-Appellee.

13. Statement of Plaintiffs-Appellants' Points on Appeal.

14. Statement of Defendant-Appellee's Points on Appeal.

15. Stipulation by Appellants and Cross-Appellees and by Appellee and Cross-Appellant as to Designation of Record.

B. To be transmitted as physical exhibits:

1. Plaintiffs' Exhibits:

(a) Plaintiffs' Exhibit 1—United States Letters Patent No. 2,001,271;

(b) Plaintiffs' Exhibit 2—Blue prints (.. sheet) of improved 14″ gate valve manufactured and sold by licensees under U. S. Letters Patent No. 2,001,-271;

(c) Plaintiffs' Exhibit 3—Blue prints (4 sheets) of 14″ gate valve manufactured and sold by defendant, Fabri-Valve Company of America;

(d) Plaintiffs' Exhibit 5—Aluminum model of gate valve manufactured and sold by licensees under United States Letters Patent No. 2,001,271;

(e) Plaintiffs' Exhibit 6—Plastic and wood model of gate valve manufactured and sold by licensees under United States Letters Patent No. 2,001,271;

(f) Plaintiffs' Exhibit 7—Plastic and wood model of gate valve manufactured and sold by defendant, Fabri-Valve Company of America;

(g) Plaintiffs' Exhibit 11—Catalogue issued by defendant, Fabri-Valve Company of America;

(h) Plaintiffs' Exhibit 12—Agreement, dated December 4, 1945, between Walter G. E. Smith and Western Machinery Corporation, an Oregon corporation, and assignment to United States National Bank of Portland, Oregon;

(i) Plaintiffs' Exhibit 13—Agreement, dated August 9, 1939, between the United States National Bank of Portland, Oregon, and Crane Co.;

(j) Plaintiffs' Exhibit 14 — Agreement, dated May 13, 1938, between the United States National Bank of Portland, Oregon, and Crane Limited;

(k) Plaintiffs' Exhibit 21—Copy of advertisement appearing on page 109 of Vol. LVII, No. 11, of the magazine "Time" by Crane Co.

2. Defendant's Physical Exhibits:

(a) Defendant's Exhibit A—Certified copy of file wrapper and contents of United States Letters Patent No. 2,001,271;

(b) Defendant's Exhibit B—Copies of reference patents cited in file wrapper of United States Letters Patent No. 2,001,271, as follows:

B1: United States Patent No. 109,001—Glass
B2: United States Patent No. 1,613,509—Gill
B3: United States Patent No. 259,658—Atcheson
B4: United States Patent No. 988,777—Hedrick
B5: United States Patent No. 1,753,524—Mawby
B6: United States Patent No. 1,065,494 — Anderson
B7: United States Patent No. 1,536,874—Bates
B8: United States Patent No. 1,379,136—Summers et al

(c) Defendant's Exhibit C—Copies of patents showing prior art:

C1: United States Patent No. 105,027—Belfield
C2: United States Patent No. 127,768—Hewes
C3: United States Patent No. 233,180—Allt
C4: United States Patent No. 286,656—Van Wie
C5: United States Patent No. 494,579—Lunken
C6: United States Patent No. 494,581—Lunkenheimer
C7: United States Patent No. 494,582—Lunkenheimer
C8: United States Patent No. 985,444—Patterson
C9: United States Patent No. 1,179,047—Snow
C10—United States Patent No. 1,483,041—Brooks
C11: United States Patent No. 1,751,122—Barker
C12: German Patent No. 17,094 (1882) Heinecke
C12t: Translation of specification of German Patent No. 17,094 Heinecke

(d) Defendant's Exhibit D—Folder containing drawings of valves of Smith patent, and defendant, and prior art patents;

(e) Defendant's Exhibit E—Catalogue of Smith Valve Company;

(f) Defendant's Exhibit F — Photographs (F1, F2, F3) showing gate valve as manufactured by defendant, Fabri-Valve Company of America;

(g) Defendant's Exhibit G—Blue print showing gate valve as manufactured by defendant, Fabri-Valve Company of America, Group 301 3″ Bonnet Stock Valve;

(h) Defendant's Exhibit I—Wood model of valve shown in German Patent No. 17,094—Heinecke;

(i) Defendant's Exhibit M—United States Patent No. 2,000,853—Lange.

Signed at Portland, Oregon, this 28th day of July, A. D. 1954.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, Trustee, and WALTER G. E. SMITH
Appellants and Cross-Appellees
By COOK AND SCHERMERHORN,
/s/ By HAROLD D. COOK,
Of Counsel for Appellants and Cross-Appellees

FABRI-VALVE COMPANY OF AMERICA,
Appellee and Cross-Appellant
By BUCKHORN AND CHEATHAM,
/s/ By ORME E. CHEATHAM,
Of Counsel for Appellee and Cross-Appellant

[Endorsed]: Filed July 30, 1954. Paul P. O'Brien, Clerk.

NO. 14422

United States
COURT OF APPEALS
for the Ninth Circuit

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH,

Appellants,

vs.

FABRI-VALVE COMPANY OF AMERICA, a corporation,

Appellee.

FABRI-VALVE COMPANY OF AMERICA, a corporation,

Appellant,

vs.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH,

Appellees.

BRIEF OF THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, APPELLANTS AND CROSS-APPELLEES

Appeals from the United States District Court for the District of Oregon.

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NO. 14422

United States
COURT OF APPEALS
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THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH,

Appellants,

vs.

FABRI-VALVE COMPANY OF AMERICA, a corporation,

Appellee.

FABRI-VALVE COMPANY OF AMERICA, a corporation,

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THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH,

Appellees.

BRIEF OF THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, APPELLANTS AND CROSS-APPELLEES

Appeals from the United States District Court for the District of Oregon.

The District Court adjudged claim 3 of the Smith patent No. 2,001,271 to be infringed by the manufacture

and sale of gate valves as exemplified by defendant's gate valve bonnet Type A and by defendant's gate valve bonnetless Type B, as shown and illustrated by defendant's Exhibit D, plates 2 and 3, respectively. [Conclusions of Law No. II, p. 34, and Judgment, p. 35, Transcript of Record.]

Appellants, The United States National Bank of Portland, Oregon, Trustee, and Walter G. E. Smith, have appealed from the judgment of the United States District Court for the District of Oregon, wherein the Court found, adjudged and decreed:

> "The accused machines have recesses but do not have cavities and I therefore find that claims 1, 2, 5 and 6 have not been infringed." [Oral Opinion Dec. 31, 1952, p. 19, and Finding of Fact No. XI, p. 29, Transcript of Record.]
>
> "In this case * * * the patented structure represented only a minor improvement in a highly developed art * * *."
>
> "I find that a reasonable royalty is 1½% of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952, which, according to my calculations, amounts to $2,962.16." [Oral Opinion, June 17, 1953, p. 22, and Finding of Fact No. XIII, p. 30, Transcript of Record.]
>
> "That plaintiffs have and recover from defendant general damages which shall be due compensation for the making, using and/or selling of the combination of the inventions of the Letters Patent in suit, which damages shall be in the principal sum of $2962.16, together with interest thereon at the rate of six per cent (6%) per annum from May 14, 1952, until paid." [Judgment, p. 35, Transcript of Record.]

JURISDICTION

The District Court had jurisdiction under the Patent Laws (Title 28, United States Code, Section 1338), which provides:

> "(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. * * *"

Jurisdiction is pleaded in paragraph IV of the Bill of Complaint [Transcript of Record, p. 4]. This Court has jurisdiction of this appeal (Title 28, United States Code, Section 1291).

STATEMENT OF THE CASE

The Smith patent in suit, No. 2,001,271, relates to a valve for controlling the flow of pulp stock in a pulp mill. Pulp stock consists of the ultimate fibers of wood separated by treating wood chips in a digester at elevated pressures in the presence of an acid. The individual fibers "averages probably one-thousandth of an inch in diameter and from a sixteenth to an eighth of an inch long." [p. 107, Transcript of Record]. A slurry is made of the wood fibers and water and this mixture is conveyed through pipe lines under pressure and by gravity flow through flumes and header boxes in the pulp mill. Pumps and valves are mounted in the pipe lines and gates are provided in the walls of the header boxes for controlling and directing the flow of the pulp slurry. A header box in a pulp mill is similar to a header box in an irrigation

ditch and usually is equipped with gates in two or three of its side walls, which gates are employed to direct the flow from the header box to the desired flume [p. 111, Transcript of Record]. If all gates were to be closed and the flow to the header box continued, the slurry would overflow the header box in the same manner that a river would overflow a dam if all the gates in the dam were to be closed [p. 117, Transcript of Record].

A head gate of the type used to control the flow of water from an irrigation ditch is shown in the patent to Hedrick, No. 988,777. This same type of gate was used in the header boxes in pulp mills in the latter part of the year 1929 [pp. 93-94, Transcript of Record].

A valve is a device for controlling the flow of fluids in a pipe line, and is a completely enclosed structure so that pressure may be maintained on either or both sides thereof. A valve may be said to be a device for controlling fluids under pressure, whereas a head gate is a device for controlling the flow of fluids under gravity. Both valves and head gates are employed in a pulp mill.

Prior to the invention of the Smith valve the pulp and paper mills used plug valves—a cylindrical casing with a rotating plug with a round hole through the plug which could be brought into registry with inlet and outlet openings in the cylindrical casing. The fine fibers would collect between the rotating plug and the housing and become so tightly cemented therebetween as to make the valve difficult to operate. Another type of valve in use in pulp mills prior to Smith was the Reed valve—wherein a piston entered a cylinder to close inlet and

outlet orifices by blocking them off. The fine pulp would adhere to the walls of the cylinder and piston and make it impossible to move the piston to operate the valve [pp. 58 and 70, Transcript of Record].

The wedge type gate valve "is not a conventional stock valve to which the valves in suit more specifically relate" [p. 54, Transcript of Record] and each and every one of the witnesses called to testify at the trial of this case testified that wedge type gate valves were not used in pulp mills. Mr. Buckhorn, chief counsel for the defendant, addressed the Court thus:

> "Your Honor, I object to that last question and again for the reason that the wedge gate valve is not a conventional stock valve to which the valves in suit more specifically relate. The wedge gate valve is never used in a stock flow line but is used merely in clear fluid line, a clear water line or something of that sort. It is not a conventional valve in a conventional flow line." [p. 54, Transcript]

Wedge type gate valves are exemplified by patents to Belfield, No. 105,027; Hewes, No. 127,768; Allt, No. 233,180; Lunken, No. 494,579; Lunkenheimer, Nos. 494,-581 and 494,582; Patterson, No. 985,444; Snow, No. 1,179,047; Gill, No. 1,613,509; and Barker, No. 1,751,-122. The reason wedge type gate valves were not in use in pulp flow lines is that the valve gate, under control of the valve stem, is first moved to a position spaced longitudinally of the valve from the seat and is then moved into contact with the seat by some kind of wedging means which wedges the gate against the seat to close the valve. In the wedge type of valve there is no cleansing of the seat by the descending gate, or in fact

any contact between the gate and the seat until the gate has been lowered into position opposite the seat and is wedged against the seat by the wedging devices [p. 121, Transcript of Record]. If used in a pulp mill to control the flow of pulp, the fibers would adhere to the face of the gate and to the seat and prevent the valve from closing.

Smith conceived a valve particularly adapted for controlling the flow of pulp stock in a pulp and/or paper mill. He describes the problem to be solved in the following language:

> "Heretofore, in such valves, the pulp stock or other material tended to collect or lodge in the grooved valve seat, so that when the valve member is being closed the pulp is pressed between the valve and its seat and not only eventually prevents the valve from being entirely closed, but forms a hard tenacious, cement-like mass that resists the opening of the valve, and also lodges between the valve and the faces of the seat and tends to spring the valve member so that it is operated with difficulty." [Smith patent, col. 1, lines 5-15]

He then sets forth as the principal object of his invention the provision of a gate valve having means to prevent the accumulation of the pulp fibers on the valve seat. The principal object of the invention is stated as follows:

> "The principal object of my invention is to provide a gate valve especially adapted for controlling the flow of heavily laden material through a pipe line without permitting the lodging of material on the valve seat and the springing or bowing of the gate out of shape by material collected in the said seat, or by the pressure in the pipe line." [Smith patent, col. 1, lines 33-40]

A further disadvantage incident to the use of gate valves in pulp mills prior to the invention of the Smith valve was the fact that in prior art valves the groove for the gate extended all the way down the sides and across the floor of the valve and, as stated in the Smith patent, "the pulp stock or other material tends to collect in the guideways or grooves of [for] the gate and cause the latter to bind and makes it very difficult to operate. This is aggravated by the fact that the pulp, if permitted to dry, forms a hard glue-like substance from which the gate may only be broken away by taking the valve housing apart."

See also testimony of M. L. Edwards, describing this problem, at pages 109-110, Transcript of Record. Also testimony of Walter G. E. Smith at page 80, Transcript of Record.

A further object of the Smith valve was to provide a solution for this problem, and the Smith patent so states:

> "A further object of my invention is to provide a gate valve which will not accumulate material interfering with the closing of the gate, but is self-cleaning." [Col. 1, lines 41-44]

> "Further, the guide grooves in the housing walls for the gate are cut away at their lower ends on the inlet side by the said recess in the bottom of the housing, whereby material collecting in the said grooves may be cleared away by the downward movement of the gate." [Col. 1, lines 49-54]

Smith recognized two major problems in connection with controlling the flow of pulp stock in a pulp or paper mill: (1) the tendency of the pulp fibers to adhere to the face of the valve seat and to the face of the

gate and prevent the valve from closing; and (2) the accumulation of pulp stock in the guide groove for the gate, and particularly in that portion of the groove across the floor of the valve, which would prevent the gate from being lowered into the groove and into contact with the seat.

Smith solved these problems by omitting the wall of the groove for the gate across the floor of the valve, thus forming a recess on the inlet or upstream side of the gate, and by providing a gate which would scrape the pulp stock from the face of the seat into the recess. The Smith patent describes this structure and its function as follows:

> "By this construction any pulp stock or other material which may collect on the face *c'* of the housing part c is scraped off by the gate *h* into the recess *j* hence is prevented from being compressed or otherwise adhering to the valve housing, or interfering with the operation of the valve. When the gate is again opened, the material so collected in the recess will be carried away by the flow of material through the gate valve." [Col. 2, lines 41-49]

> "Further, the grooves *g* in which the gate *h* is slidable are cut away as at *m* at the bottom on the inlet side, down to the inclined bottom surface, *j*, see Figs. 1 and 5; thus any stock that has accumulated in said grooves is scraped off by the edge of the gate and discharged on to the bottom surface or floor of the housing and carried away with the next flow of material thru the gate valve." [Col. 3, lines 16-23]

Original claims 6, 7 and 8, submitted with the application for patent as filed, described the recess in the floor of the valve in the following language:

> "* * * a recess in the floor of said housing on the inlet side of said gate, said recess extending laterally whereby the walls of said guide grooves of the gate are cut away by the recess on the inlet side, * * *."

In the Smith valve the seat is on the downstream or outlet side of the gate. The seat is formed by the face *c'* of the housing part *c* and supports the gate against the thrust of the pressure of the inlet fluid as the gate is being closed. Since any pulp stock which has accumulated on the face of the seat, or in the guide grooves for the gate, is scraped off by the descending gate and discharged into the recess in the floor of the valve on the upstream or inlet side of the gate, when the gate is opened such material is flushed up and over the lower portion of the transverse wall which forms the seat and is carried away by the flow of material through the valve. In prior art patents for gate type valves, such as Gill No. 1,613,509, any such recess was on the downstream or outlet side of the gate and the wall of the guide groove on the upstream side caused the pulp stock to accumulate in the groove much in the same manner as snow accumulates or "drifts" on the lee side of a snow fence or other obstruction.

The patent recites that the outlet port in the Smith valve is formed V-shaped at the bottom, as at *l*,

> "whereby the outlet opening, as the gate is closed, is diminished laterally by the wall portion *l'* at an equal and uniform rate and the gate is thus supported at its sides as it is closed, and the pressure of the material on the gate, which increases relatively to the decreased size of the opening, is prevented from springing or bowing the gate against the outlet

> port, and thus interfering with the operation of the gate. This is particularly important for the reason that in providing the lower edge of the gate with a beveled edge, it is somewhat weakened, and the tendency to be bowed by the pressure of the stock is increased."

The V-shaped outlet opening was thought to be necessary should pipe line pressures run from 125 to 150 pounds per square inch, but, since "actual pulp mill pressure is rarely over 30 it made a lot of difference" [p. 87, Transcript]. The Smith valves are made with round outlet openings, and a 14 inch valve installed twenty years ago in the Crown Zellerbach mill at Camas, Washington, and having a round outlet opening is still in use [p. 78, Transcript]. Mr. Harold S. Hilton, sales engineer for the defendant company, designer of the infringing valves, testified that with the same area of opening of the outlet port the transverse wall of the infringing valve would provide the same amount of support for the gate as in the Smith valve.

Defendant's gate valves embody each and every structural element of the Smith valve. Defendant's gate valve bonnetless type B is substantially a Chinese copy of the Smith valve. Both the Smith valve and the infringing valve are made of several separate parts. In each valve the housing for the inlet port is bolted to the housing for the outlet port with a spacer plate positioned between the meeting ends of the housings to form a guide groove for the gate. In each of these valves the face of the end wall of the housing for the outlet port forms the seat and supports the gate against the thrust

of the pressure of the inlet fluid. In each valve any stock that has accumulated on the face of the seat or in the guide grooves is scraped off by the edge of the gate and discharged onto the bottom surface or floor of the housing on the inlet side of the gate and is carried away with the next flow of material through the valve. In each valve the wall of the guide groove for the gate is cut away (or omitted) on the inlet side of the gate, thus forming a recess (but not a groove) in the floor of the housing on the inlet side of the seat. In a valve in which the housing is of rectangular shape at mid-portion (as illustrated in the Smith patent) the recess in the floor of the housing extends laterally to such extent that the walls of the guide groove on the inlet side are cut away. In defendant's valves the housing is round, but in each valve (types A and B) the walls of the guide groove on the inlet side also are cut away by the recess formed in front of the "transverse wall" or valve seat.

SPECIFICATIONS OF ERROR

Appellants rely upon each of the errors assigned by them in the Statement of Points on Appeal, filed June 14, 1954. For convenience of the Court these assignments of error may be grouped and discussed by groups, as follows:

I. The District Court erred in finding claims 1, 2, 5 and 6 of the Smith patent in suit not infringed by valves manufactured and sold by defendant for the reason that each of these claims provides for cavities *at the bottom*

of the side wall on the inlet side, and the accused valves have recesses but do not have *cavities* [Oral opinion, December 31, 1952, p. 19, Transcript]. Statement of Points on Appeal, paragraphs numbered 1 and 2.

II. The District Court erred in holding that the patented structure of the Smith patent in suit represented only a minor improvement in a highly developed art [Oral opinion, June 17, 1953, p. 22, Transcript]. Statement of Points on Appeal, paragraph 3.

III. The District Court erred in refusing to use plaintiffs' established royalty as the measure of damages to be assessed against defendant for infringement of the Smith patent in suit, and in refusing to find that plaintiffs are entitled to receive as damages a royalty computed at the rate of five per cent of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952, which is the royalty established by all licenses given and granted prior to the commencement of the acts of defendant complained of [Oral opinion, June 17, 1953, p. 22, Transcript]. Statement of Points on Appeal, paragraphs numbered 5 and 7.

IV. The District Court erred in holding that plaintiffs were entitled to receive as damages royalties computed at a rate of no more than one and one-half per cent of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952, which royalties at such rate amount to $2962.16 [Oral opinion, June 17, 1952, p. 22, Transcript]. Statement of Points of Appeal, paragraph 4.

V. The District Court erred in refusing to find that plaintiffs were entitled to receive as damages additional royalties computed at the rate of seven and one-half per cent of the total sales price of all the valves sold by defendant in the eleven Western states between April 13, 1950 and May 14, 1952 in direct and unlawful competition with plaintiffs' licensee, Western Machinery Company [Findings of Fact No. XX, p. 24, Transcript]. Statement of Points on Appeal, paragraph 6.

SUMMARY OF ARGUMENT

I. The improvements which characterize the Smith valve, and which distinguish it from all gate valves known theretofore were new, novel and patentable at the time Smith made application for Letters Patent therefor. These improvements constituted a very real contribution to the art and provided a solution for a very real problem in the handling of paper and pulp stock.

The prior patents cited by the Examiner at the Patent Office during prosecution of the Smith application were not pertinent to the invention. The greater number of them relate to wedge type valves in which the gate does not contact the seat until the gate has been moved to closing position, so that there is no scraping of the seat by the gate in any such wedge type valve. Claims broadly defining the Smith invention were allowed notwithstanding the citation of such patents. The District Court found, therefore, that "the arguments of the law-

yer [who prosecuted the Smith application for Letters Patent] * * * and his attempt to distinguish Gill and Hedrick do not constitute file wrapper estoppel."

Plates 1, 2 and 3 of defendant's exhibit D show isometric views of the Smith valve and of defendant's bonnet type valve (type A) and defendant's bonnetless type valve (type B). These drawings show the gates, the grooves formed in the side walls of the housings, the transverse walls or seats which support the respective gates against the thrust of the pressure of the inlet fluid, the floor of each valve on the inlet side of the gate, the fact that each gate is provided with a cutting edge, and the recess in the floor of each valve on the inlet side of the gate formed by omitting the wall of the groove on the inlet side of the gate.

In comparing the valve structures as shown in these views, let it first be understood that the rings welded to the valve housing in defendant's bonnet type gate valve *are part of the housing*. It makes no difference whether defendant casts his housing in one piece or fabricates it from a number of pieces welded together. Welding makes the parts integral, and they are one. The Smith claims call for "grooves formed in the side walls of the housing". Grooves formed by spaced rings welded to the tubing in defendant's device are as much "grooves formed in the side walls" as grooves formed by so casting the housing in plaintiffs' device. Defendant is trying to make the Smith claims say: *"recessed into the side walls"*, and to make this mean something different than "formed in the side walls", which is the language of the claims.

Plate 2 of defendant's exhibit D shows defendant's bonnet type gate valve wherein the spaced rings 15 and 16 welded to the valve housing provide "grooves formed in the side walls". The ring 16 on the inlet side of the valve is cut away to provide a recess in the floor of the valve housing. The cut ends of the ring form V-shaped cavities wherein the V lies on its side, and thus the cavity shaped by the angle formed by the end of the ring with the circular wall is not wholly unlike the cavities in plaintiffs' valve. These cavities certainly do connect with the grooves within which the gate is slidable, and serve the purpose of assisting in the escape of material scraped off by the gate while being closed. This material escapes into the recess in the floor of the valve between the ends of the ring, from whence it is swept over the solid ring on the outlet side of the gate whenever the gate is opened.

Plate 3 shows defendant's bonnetless type gate valve wherein the lower half of the housing at the gate is made in a shape created by overlapping circles. The floor of the valve on the outlet side of the valve is on the arc of one circle, whereas the floor of the valve on the inlet side of the valve is on the arc of a circle whose center is spaced from the center of the first circle by a distance equal to the height of the transverse wall 15.

The differences between plaintiffs' and defendant's valves in this respect exist largely because of the difference in shape of the outlet port—one being round and the other square. If both were the same shape, then differences would disappear, because, basically, the same type of structural elements is involved.

Defendant says that the greater portion of the flange in the type B valve, and the lower ring portion of the type A valve, on the inlet side of the gate, are omitted. Defendant further says that these portions are omitted to eliminate the formation of a pocket at the lower end of the gate which might fill up with debris. Let the Honorable Court understand that the forward wall of the groove in plaintiffs' valve is removed *for exactly the same reason.* Each valve has the same features (in slightly different form) to serve exactly the same function. Defendant's valve is so closely a copy of plaintiffs' valve that it needs must take the novel features of plaintiffs' construction along with those portions which are conventional in valve construction. It is plaintiffs' contention that defendant's valve utilizes structural features which are the full mechanical equivalents of the same parts employed by plaintiffs and which perform the same functions, and that plaintiffs' patent is entitled to a range of equivalents which is inclusive thereof.

II. The structural features of plaintiffs' valve, which differentiate it from valves known and in use prior to December 3, 1930 (the date of filing of the application which matured as the Smith patent in suit) are these:

(a) The seat for the gate is on the outlet side of the gate, the gate being held against its seat during movement between open and closed positions by closely fitting grooves in the valve housing and by the force of the fluid flowing through the valve. Defendant's valve utilizes this feature of Smith's contribution to the art.

In single wedge type gates such as shown by Gill, Belfield, Lunkenheimer, Patterson, and others, the gate does not engage the seat until almost in the closed position, at which time it is wedged against the seat by the action of the wall 6 in Gill, the inclined ribs ff in Belfield, the wedging piece G in Lunkenheimer, and the guide surfaces KK in Patterson. These wedging elements thrust the gate forward against the force of the flow through the valve with a sudden motion, so that there is no contact with the valve seat by the descending valve, as in plaintiffs' and defendant's valves, until the gate is almost in closed position.

(b) Because it is held tightly against its seat, the gate in plaintiffs' valve is provided with a cutting edge to scrape material from the face of the seat and to plow material from the guide grooves away from the lower portion of the seat when the gate reaches closed position.

The Brooks patent shows a knife edge on the gate, which sharpened edge 19 is provided for cutting into short length objects of any appreciable length which may be passing through the valve. The gate 9 of Brooks is not expected to scrape material from the valve seat, for the reason that the seat is on the upstream or inlet side of the gate, and pulp fibers and the like material would not tend to adhere thereto, but, rather, to the outlet side of the groove. The knife edge of Brooks' gate would not scrape material from the walls of the groove on the outlet side of the gate for the reason that it does not contact that side of the groove, but, rather, is pressed

against the seat on the inlet side of the gate, as in the Gill, Patterson and Belfield patents.

Defendant's structure follows plaintiffs' teaching in this respect, and defendant's gate is made to scrape material from the valve seat on the outlet side of the gate.

> (c) The wall on the inlet side of the groove in which the gate slides is omitted at the floor or lower portion of the valve housing.

This structure is not shown in any prior art patent. The construction is practical for the reason that, once the gate is closed, the pressure of fluid on the inlet side of the gate holds the gate against the seat. The omitted wall of the groove provides a recess on the inlet side of the gate into which the material scraped from the guide grooves and from the face of the valve seat can collect without interfering with the action of the gate. This is an extremely important feature of the Smith valve, and defendant has copied this feature in an infringing structure.

> (d) The valve housing is so shaped [provided with cavities] at the lower ends of the guide grooves to enable material to flow from the grooves ahead of the descending gate. These "cavities" are the edge portions of the recess in the floor of the inlet side of the housing, and are provided to permit material to get away from the lower ends of the guide grooves.

There is no disclosure of this element in the prior art. Defendants' valves embody the full equivalent of

this feature by a structure which provides that the material which is removed from the grooves by the descending gate can flow away from the lower ends of the grooves and out into the recess created by the omitted forward wall of the grooves.

(e) In the Smith valve, the gate is made of sufficient length so that even in closed position it extends through the stuffing box so that accumulations of pulp in the bonnet cannot interfere with movement of the gate, as could happen in the valve where the entire gate descends out of the bonnet, leaving the empty bonnet to fill with pulp, as in Gill.

This feature is not shown in the prior art, for the reason that this type of construction was not known to the art before the advent of the Smith valve. Defendant employs the same construction in the valve shown on Plate 3. The construction is shown in the pictorial representation at the upper right-hand corner of the drawing.

(f) A transverse wall separating the inlet and outlet ports and provided with an opening, which wall supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed, whereby the cutting edge of the gate makes a relatively oblique cut through the material located in the opening.

No prior art patents show the transverse wall supporting the gate against the thrust of the pressure of the inlet fluid, the gate being held against the wall during

movement from open to closed position, to make an oblique cut through material located in the opening. Defendant's valves utilize this exact structure. The transverse wall of defendant's valves support the gate against the thrust of the pressure of the inlet fluid in exactly the same manner as does the transverse wall of the Smith valve. Defendant's own witnesses so testified.

III. Plaintiffs have proved the existence of *established royalties* by introducing in evidence copies of the licenses granted to Crane Company and to Crane Company of Canada for the exclusive manufacture, sale and distribution of the patented valves, except in the eleven Western states of the United States, for which the licensees paid a license fee or royalty of 5% of the sales price. These licenses were granted in 1938 and 1939, respectively. In 1945 plaintiffs granted an exclusive license to Western Machinery Company of Portland, Oregon, for the territory not covered by the Crane Company license. Western Machinery Company agreed to pay a license fee or royalty of 12½%, but it is understood that the royalty payment was split, 7½% to Smith for the use of drawings, specifications and patterns, and 5% to the owners of the patent as royalty for the manufacture, use and sale of the patented valve. Thus, it appears that in the United States two licensees enjoyed the exclusive right to make, use and sell the patented valve in their respective territories, and in Canada a third licensee acquired the exclusive right to make, use and sell the patented valve throughout that country. Each of the licensees was required to pay a royalty of 5% of

the sales price for the right to make, use and sell the valves.

The fact that there was but one license fee for a given territory does not prevent plaintiffs from establishing the fact of *established royalties*. In Reliance Construction Company et al v. Hassam Paving Company et al., C.C.A. 9; 248 F. 701, the Oregon Hassam Paving Company was granted the *exclusive* right, license and privilege to make, use and sell the patented invention within the state of Oregon. In that case the Ninth Circuit Court of Appeals held that the license fee was an *established* royalty. In Carley Life Float Company v. United States, 13 Pat. Q. 112, the Court of Claims held that in a suit against the United States to recover just and reasonable compensation for infringement, brought by the owner of the patent who had granted an *exclusive license* to manufacture and sell, the percentage of the selling price of the patented article paid by the exclusive licensee was a proper basis for the determination of the compensation due the plaintiff by reason of the infringement. The Court quoted with favor the excerpts from Clark v. Wooster, 119 U.S. 322, 326.

Plaintiffs also have proven the nature of the invention, its utility and advantages and the extent of use involved. Crane Company has been a licensee under the patent since 1938, and has supplied the Smith valve to the paper and pulp industry since that date. The advertisements running in Time Magazine, of which a tear sheet is in evidence in this cause (plaintiffs' exhibit No. 21), illustrates the general acceptance and utility of

the valve. The royalty paid was 5% of the sales price. The fact that defendant manufactured and sold infringing valves for which sales between the dates of April 13, 1950 and May 14, 1952—a period of two years and one month—amounted to $197,476.73, itself indicates the value and demand for the valve and the fact of its universal acceptance by the pulp and paper industry. The three licensees have assumed the patent to be valid, and respected plaintiffs' rights therein, and have continued to pay the required license fees up to the date of expiration of the patent, notwithstanding defendant's infringement thereof.

The Court has erred in finding that defendant shall have had the privilege of doing business under the patent for a less fee than was paid by the legitimate licensees. It should be the other way around. The language of the Ninth Circuit Court of Appeals in Reliance Construction Company et al. v. Hassam Paving Company, et al., supra, is a just and proper pronouncement of the equities in such cases. It will be remembered that in that case the Court held that the royalty charged an exclusive licensee, who invested capital and incurred the expense of preparing plants and entered into the business of supplying the patented articles, would be an *inadequate* royalty and measure of damages for infringement. The Court said:

> "For the infringer in this case to pay the licensee damages measured [in the figures of the same royalty as paid by a legitimate licensee] would not meet the demands of justice."

In General Motors Corporation v. Blackmore, 53 F. 2d 725, Circuit Judge Hickenlooper said that the infringer was not entitled to equality of treatment with the licensee, and certainly not preferential treatment. In the present case the Court has given the infringer preferential treatment by assessing a royalty of 1½% for the infringement, whereas the legitimate licensees have paid a royalty of 5%.

IV. In fixing a *reasonable* royalty for infringement [as differentiated from an *established* royalty], the primary inquiry is what the parties would have agreed to do, if both were reasonably trying to reach an agreement, in the determination of which the commercial situation must be considered.

In Egry Register Co. v. Standard Register Co., 23 F. (2d) 438, 443, the Circuit Court of Appeals for the 6th Circuit adopted the following theory of recovery on the basis of "reasonable royalty":

> "To adopt a *reasonable* royalty as the measure of damages is to adopt and interpret, as well as may be, the fiction that a license was to be granted at the time of beginning the infringement, and then to determine what the license price should have been. In effect, the court assumes the existence, ab initio of, and declares the equitable terms of, a supposititious license, and does this nunc pro tunc; it creates and applies retrospectively a compulsory license."

Pertinent to this subject is the statement of District Judge Clark, speaking for the Court of Appeals for the Ninth Circuit in The Filtex Corporation v. Atiyeh, 103 USPQ 197:

"As to what would be a reasonable royalty presents a serious question. Many factors determine a reasonable royalty other than the precise improvement. The entire unit must be considered. However, it must be borne in mind that the defendant in this case is the wrongdoer and as stated in Horvath v. McCord Radiator & Mfg. Co. et al., 100 F. (d 326-335, 40 USPQ 394, 402-403:

> " 'McCord is an infringer and the burden must be placed upon it as a wrongdoer and it is the duty of the Court to find for Horvath with reasonable approximation that to which he is entitled and in so doing, there is no duty to exercise meticulous care to avoid a hardship on McCord.'

"It is earnestly contended by the defendant that the royalty of ten percent allowed by the master was too high, but from an examination of the record we see no reason which would warrant disturbing the findings of the master or the finding of the trial Court sustaining his finding."

In the instant case it can hardly be expected that the plaintiffs would have granted defendant a license at a lesser royalty or license fee than prior licensees were paying. To do so would have been to grant defendant a preferential position in the trade—and when one considers the larger volume of sales by Crane Company and the years of its satisfactory operation under the license, it is inconceivable that plaintiffs would grant defendant a license that would be detrimental to the prior licensee.

V. Plaintiffs' losses are two-fold:

(1) Loss suffered by the United States National Bank, Trustee, of royalties computed at the rate of 5% of the total sales price of all valves manufactured

and sold by defendant between April 13, 1950 and May 14, 1952. Defendant's total sales of all valves manufactured and sold between April 13, 1950 and May 14, 1952 amountd to $197,476.73, and plaintiff, The United States National Bank, Trustee, is entitled to recover from defendant damages computed as 5% of this amount, which is the sum of $9873.84.

(2) Loss suffered by Walter G. E. Smith of 7½% of the total sales price of all said valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952. This statement of plaintiffs' losses is based on the assumption that plaintiffs' licensees would have manufactured and sold the valves which defendant manufactured and sold had defendant not infringed the Smith patent. This is believed to be a logical and safe assumption for the reason that the Smith valve has been universally accepted by the trade, and the Smith licensees were the only manufacturers of this type of valve up to the time of defendant's appropriation thereof. Since Western Machinery Company was an *exclusive* licensee for the territory of the eleven Western states, it is reasonable to assume that Western Machinery Company would have received orders for valves which defendant sold in this territory. Defendant's sales in the eleven Western states amounted to $179,617.93, and plaintiff, Walter G. E. Smith, is entitled to recover from defendant damages computed as 7½% of this amount, said damages amounting to $13,471.34.

ARGUMENT

There is error in the District Court's finding that the valves manufactured by defendant do not provide *cavities* in the side walls of the inlet ends of defendant's valve housings connected with the guide grooves in which to receive the material scraped off by the gate while being closed.

The Smith Valve

Plaintiffs contend that the "cavities connecting with said grooves in which to receive the material scraped off by the gate while being closed", as recited in claim 1 of the Smith patent, is one and the same thing as the recess *j* shown in the drawings, described in the specifications, and named as an element in claims presented during prosecution of the application.

It must be remembered that the principal object of the Smith invention was to provide a gate valve especially adapted to control the flow of heavily laden material through a pipe line without permitting the lodging of material on the valve seat and the springing or bowing of the gate out of shape by material collected on the said seat, or by the pressure in the pipe line [p. 1, col. 1, lines 33 et seq.].

The description of the valve in the Smith patent recites that the guide grooves in the housing walls for the gate are cut away at their lower ends *on the inlet side* by the recess in the bottom of the housing, whereby

material collecting in the grooves may be cleared away by the downward movement of the gate [p. 1, col. 1, lines 49 et seq.]. There is no description in the Smith patent of *cavities m* in the wall of the housing. The description of the valve says that the floor of the valve slopes downward from the inlet port *e* toward the seat *k* of the gate *h* to provide a recess *j*. The specification also says that the *grooves g in which the gate is slideable are cut away as at m* [it is the front wall of grooves *g* which are cut away] down to the inclined bottom surface *j*. In other words, insofar as the Smith valve is described in the patent, the reference letter *m* is intended to show where the groove *g* is cut away on the inlet side down to the inclined bottom surface *j* in order that stock which accumulates in the grooves, and which is scraped off by the edge of the gate, will be discharged onto the bottom surface *j* of the housing. From thence it may be carried away with the next flow of material through the gate.

The reason for cutting away the bottom portion of the *wall of the groove on the inlet side* is so that any stock that has accumulated in said groove, and which may be scraped off by the edge of the gate, will be spilled out of the groove onto the bottom surface or floor of the housing, to be carried away with the next flow of material when the gate is opened.

This fact is uncontrovertible: Smith did not describe a cavity *m*. The word "cavity" does not appear in the application as filed, nor in the specification of the patent as granted. *Smith did not use the letter m to point to*

a cavity in the side walls of the housing, but rather to a cut away portion of the inlet side of the wall of the groove *g*. This is the meaning of Smith's statement on page 1, column 1, lines 49 et seq., where he says:

> "The guide grooves in the housing walls * * * are cut away at their lower ends on the inlet side by the recess in the bottom of the housing."

It is the lateral extension of the recess *j*—the recess in the floor of the housing on the inlet side—which cuts away the wall of the groove *g* on the inlet side as shown at *m*.

Defendant's Bonnetless Type B Valve

Plate 3 of defendant's exhibit D shows a bonnetless type (Type B) of valve which incorporates all of the elements of plaintiffs' construction and closely resembles the Smith valve. The valve is made of a housing in two parts—an inlet part and an outlet part with a spacer plate interposed therebetween to form grooves in the side walls of the housing in which the gate slides. The wall of the grooves on the outlet side is formed by the face of the outlet portion of the housing, and this face forms the transverse wall against which the gate slides, exactly as in the Smith valve. Because of the closely fitting walls of the grooves, *the gate slides against the face of the transverse wall* as the gate moves from open to closed positions.

In defendant's valves the gate is tapered or beveled at its lower edge *towards the outlet side* to form a knife edge to scrape material from the face of the transverse

wall and to plow material from the guide grooves and away from the valve seat as the gate approaches closed position.

In defendant's valve, shown on Plate 3 of defendant's exhibit D, *the floor of the inlet side of the housing inclines downwardly toward the cutting edge of the gate when in closed position.* This can best be seen by examination of the side elevation of the valve shown at the upper left-hand corner of defendant's Plate 3.

The recess formed in the floor of the inlet side of the housing extends laterally (from side to side of the housing) and cuts away the walls of the grooves for the gate on the inlet side so that material scraped off the face of the "transverse wall" can be received into the recess in the floor of the housing. The Smith patent describes the "cavities" in the side walls of the housing as:

> "The guide grooves in the housing walls for the gate are cut away at their lower ends on the inlet side of the said recess in the bottom of the housing, whereby material collecting in said grooves may be cleared away by the downward movement of the gate." (p. 1, col. 1, lines 49-54)

The structure as thus described in the Smith patent is duplicated in the valve shown on Plate 3 of defendant's exhibit D.

The outlet housing in defendant's valve frames a round opening, the lower end of which is arcuate instead of V-shape. The only differences between the valve shown in defendant's Plate 3 and the Smith valve are (1) the shape of the opening through the transverse wall

which forms the valve seat, (2) the fact that the lower end of defendant's gate is arcuate whereas the lower end of the Smith gate is rectangular, and (3) the *shape* of the "cavities" at the bottom of the grooves in which to receive the material scraped off by the gate while being closed. Defendant's drawing on Plate 3 does not show the shape of the housing which creates the "cavities" connecting with the grooves in which to receive the material scraped off by the gate while being closed, but an examination of plaintiffs' exhibit 9 reveals the presence of this element created by extending the recess in the floor of the housing sufficiently far enough to each side to cut away the walls on the inlet side of the groove, and this is exactly the same way that the "cavities" are created in the Smith valve, the only difference being in the shape of the cavities caused by the difference in the shape of the opening through the valve.

Mr. Hilton, designor of defendant's valves, testified that the transverse wall of defendant's valve *supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed,* and that when the area of this opening through defendant's valve is approximately the same as the area of the opening through the Smith valve, the support for the gate is approximately the same. His testimony follows:

> "Q. I believe you testified that all of these gate valves required what you are pleased to call a transverse wall; is that true?
>
> A. That is correct, on the outlet side they all have a complete circular seat.
>
> Q. Some kind of a seating support there to support the gate?
>
> A. That's right." (Transcript, p. 158)

* * *

Q. One more thing that brings up. Because of the difference in shape of the openings in this, in plaintiffs' valve is a V-shaped opening, and when the gate is lowered to say within a half inch of the extreme bottom of the opening, which leaves a certain area, I don't know how much, perhaps a square inch or half an inch, I don't know, I haven't figured it up, and the same thing happens in defendant's valves because of the crescent moon that it makes. The gate can come a great deal closer to the extreme bottom of the valve and still have the same amount of area because the area is in a longer, thinner line, but with the same volume of material going through the valve you would have approximately the same support on your transverse wall with the same area open. Do you agree to that, Mr. Hilton?

A. Well I would have to lie one across the other to measure it, but it sounds reasonable, yes." (Transcript, p. 159)

A comparison of the valve shown on Plate 3 of defendant's exhibit D with the Smith valve poses the following questions.

All other structural elements being alike, each a counterpart of the other, and employed in the same relationship in each of the valves:

(a) Is defendant's structure wherein the recess in the floor of the inlet housing extends to each side far enough to cut away the lower ends of the grooves for the gate the full equivalent of "cavities" provided in the side walls of plaintiffs' structure, where in both plaintiffs' and defendant's valves the "cavities" connect with said grooves to receive the material scraped off by the gate while being closed?

(b) Is the arcuate lower end of the opening through the transverse wall in defendant's structure the full equivalent of the V-shaped lower end of the same opening in plaintiffs' structure, no reason being assigned for changing the shape of said opening other than to avoid the claims of the Smith patent?

Defendant's Bonnet Type A Valve

Plate 2 of defendant's exhibit D shows a valve having an inlet port and an outlet port and a gate slidable between said ports in grooves formed by parallel rings mounted on the inner walls of the tubing forming the housing. Mr. Hilton, who designed defendant's valves, testified that the ring 15 in the valve shown in defendant's Plate 2 functions as a transverse wall. His testimony follows:

> "Q. And in the structure shown on Plate 2 which, I believe, is the Exhibit O, the ring, the solid ring, the complete ring in that structure functions as a transverse wall; is that true?
>
> A. That is correct. That is the seating ring on the outlet side of the bonnet type, yes."

The ring 16 is cut away adjacent the floor of the inlet side of the housing to form a recess for receiving material scraped off the transverse wall by the gate while being closed. Mr. Hilton testified:

> "Q. And some of the fibers, you say, which collects in the groove is pushed ahead of the gate and out of the groove and onto the floor of the valve; is that correct?
>
> A. Well, it would have to to close the valve, yes." (Transcript, p. 53)

* * *

Q. In the valves wherein you have parallel rings mounted to make the groove for the gate, the ring on the upstream side or the inlet side of the valve is cut away at the bottom of the valve for what purpose?

A. The same reason that this is cut away." (Transcript, p. 56)

[The witness was referring to plaintiffs' Exhibit 7 showing the wall on the inlet side of the groove cut away adjacent the floor of the valve.] It will be seen that the ring 16 is cut away adjacent the floor of the inlet end of the housing in defendant's valve of Plate 2 to form a recess for receiving material scraped off of the transverse wall by the gate while being closed.

Mr. Smith testified that in the valve illustrated on Plate 2 the recess between the ends 17 of the ring 16 is the equivalent of the Smith structure wherein the depressed floor in the inlet housing forms the recess *j*. (Transcript, pp. 114-115). His testimony in this respect was not traversed.

In the valve structure shown on Plate 2 of defendant's exhibit D, the rings 15 and 16 must be considered as being an integral part of the walls of the housing, since they are welded thereto and are made a permanent part thereof. It will be noted that the ends 17 of the ring 16 are cut away adjacent the floor of the valve and form "cavities" whereby material collecting in the groove may be cleared away by the downward movement of the gate. In other words, the purpose and function of the cut away ring 16 in defendant's structure is exactly the same as the "cavities" in the side walls of the inlet hous-

ing of the Smith valve. Plaintiffs contend, therefore, that the cut away ring 16 creates a "cavity" connecting with the grooves in which the gate is slidable in which to receive the material scraped off by the gate while being closed. Else why was a portion of the ring removed? To prevail, must plaintiffs' claims say, "a portion of the *wall of said inlet side being cut away* to create a cavity connecting with said groove to receive the material scraped off by the gate while being closed"? Certainly, the word "cavities" (which plaintiffs' patent defines as being formed by the recess in the bottom of the housing) is of sufficient scope to cover a structure created by the same means to perform the same function in substantially the same manner to accomplish the same results.

Mr. Smith testified that the *bottom* of the housing in defendant's valve is a surface marked by a plane extending from the inner edge of the inlet port 11 to the inner surface of the ring 15, and that beneath this plane, in the area between the ends 17 of the ring 16, is the *recess* in the floor of the inlet housing. The testimony was not controverted. Using the language of the Smith patent: "any pulp stock or other material which may collect on the face *c'* of the housing part *c* is scraped off by the plate *h* into the recess *j*, hence is prevented from being compressed or otherwise adhering to the valve housing, or interfering with the operation of the valve." Mr. Hilton testified that the purpose of this recess is "so that it [the groove] will not trap any material in between the two seats like a wedge gate, as you have indicated, and build it [an accumulation of pulp] up so you cannot shut it [the gate]." (Transcript, p. 54)

A comparison of defendant's valve shown on Plate 2 with the Smith valve poses the following questions:

(c) The rings 15 and 16 of defendant's valve structure being welded to and made a part of the walls of the valve housing, are the grooves formed by said rings the full equivalent of "grooves formed in the side walls of said housing" as recited by the claims in the Smith patent?

(d) Is the ring 15 of defendant's valve structure the full equivalent of "a transverse wall separating the inlet and outlet ports" as called for by the claims in suit, 3, 5 and 6?

(e) Is the area between the ends 17 of the ring 16 in defendant's valve structure the full equivalent of the recess *j* of the Smith valve, in which to receive material which may collect on the face of the ring 15 and be scraped therefrom by the gate 14 while being closed?

(f) Are the cavities formed by the cut away portion of the ring 16, adjacent the ends 17 [the ring 16 being an integral part of the housing wall] the full equivalent of "cavities in the walls of the inlet side of the housing connected with the grooves in which to receive the material scraped off by the gate while being closed"?

If these questions can be answered in the affirmative, then plaintiffs must prevail.

Defendant says that in both of defendant's valves the defendant simply omits or terminates the outwardly ex-

tending flanges or rings defining the gate grooves at a point above the bottom of the valve and on one side of the gate, thereby permitting escape of pulp stock which is pushed downwardly by the descending gate (p. 6). Defendant says that such termination of the gate groove is shown by certain ones of the prior art (p. 6), *but not on the inlet side of the valve. This was a novel concept on the part of Smith, and defendant copied him!* The defendant says that whether such omission is made on the inlet or outlet side of the gate is of no moment. *But defendant copied the structure!* And defendant well knows that to change relative location of parts *when function is changed,* as in the instant case, amounts to invention! 69 C.J.S. 284.

Law Relating to Substitution of Equivalents

> "What shall it profit a patentee that his patent is declared valid if his claims are so precisely read, the range of equivalents so narrowly confined, that piracy is rewarded for the cunningness of its dissimulation and the patentee is robbed of the fruits of his invention?"
>
> —Circuit Judge Hutcheson.

In applying the law relating to substitution of equivalents, Circuit Judge Hutcheson, of the Circuit Court of Appeals for the Fifth Circuit, in Matthews et al. v. Koolvent Metal Awning Company, 158 F. 2d 37; 71 USPQ 219, says:

> "We are not concerned here with determining whether defendant's device, which plaintiffs charge is an infringement of the Matthews patent, is exactly the same in appearance or in form, but merely

whether it is substantially the same function. In short, the decisive question here is reading the claims of plaintiffs' patent on the Koolvent awning and interpreting them fairly in accordance with their plain intent and coverage, does defendant's device infringe? We think it does. The doctrine of equivalency has never been a mere dry bones doctrine. Put forward to do justice and prevent defrauding by dissimulation and deceit, it should be, it has been, applied to give its equitable purpose effect. Not at all recondite or difficult of understanding or application, it is the mere expression and application of the view that like things are alike and that they are not made unlike by formal and nonsubstantial changes, no matter how cunningly contrived the dissimulation, how clever the changes in form. We think it clear that defendant's device is substantially identical in function with, and is an infringement of, claims three, four, five, nine and ten of the Matthews patent.

"The judgment is reversed, and the cause is remanded for further proceedings consistent herewith."

The pronouncement of the Circuit Court of Appeals for the 7th Circuit in Union Asbestos & Rubber Company v. Gustin-Bacon Manufacturing Company, 169 F. 2d 686; 78 USPQ 238, is an answer to defendant's contention that plaintiffs are limited to a transverse wall provided with an opening having its lower end formed V-shape. The Court's decision recites that the patent was granted in a crowded art and that the claims must be strictly construed in the light of the specification. The patent specification discloses the use of asbestos as its preferred embodiment of a "heat insulating fiber filling material", and the alleged infringer used a glass fiber filler for such purpose. Circuit Judge Spark said:

"Each constitutes a filler of heat insulating fiber filling material, and they differ only in kind. They perform the same service, in the same manner, by the same means and for the same purpose.

"* * * True the specification refers neither directly nor indirectly to any sort of a filler except asbestos, yet applicant was only required to set forth his preferred sort of filler material, as defined by the claim, and by so doing he would not be precluded from protection against the use of any sort of filler material which would fully meet the requirements of the claim."

District Judge Ridge, of the District Court of the Western District of Missouri, in Cissell v. Cleaners Specialties, Inc., 81 F.S. 71, 79 USPQ 395, in a rather extended discussion of the law relating to substitution of equivalents, makes these observations:

"There is a structural difference between defendant's device and plaintiff's invention. Infringement is not avoided on that ground if defendant's device appropriates the principle and mode of operation of plaintiff's invention. Baldwin Rubber Co. v. Paine & Willins Co., 99 F. 2d 1, 5; 39 USPQ 455, 458-459 * * *.

"Plaintiff's invention relates to improvement in an apparatus for dispensing steam in the treatment of fabric in the art of dry cleaning garments. The claims allowed therefor by the Patent Office are a new combination of previously known elements in a novel, new and useful manner, providing a unitarily controlled method of dispensing steam of varying water content, and instantaneously changing the same in the treatment of fabrics in the dry cleaning industry. Such is the scope of plaintiff's patent. Gen. Motors Corp. v. Kesling, 164 F. 2d 824 [76 USPQ 30]. Form is not of the essence thereof, hence the mathematical measurements and structural differ-

ence of plaintiff's invention compared with defendant's device is of little consequence to the issue of infringement charged. Freeman v. Altvater, 66 F. 2d 506 [18 USPQ 186]. The combination of claims in plaintiff's letters patent is the measure of plaintiff's invention. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405. Defendant's structure embodies every mechanism that is described in plaintiff's letters patent and each of the claims made therefor. If plaintiff's letters patent are valid, infringement is here present. Lourie Implement Co. v. Lenhart, et al., 130 F. 122; G. H. Packwood Mfg. Co. v. St. Louis Janitor Supply Co., 115 F. 2d 958 [58 USPQ 4]; General Ry. Signal Co. v. Great Northern Ry. Co., 43 F. 2d 790 [6 USPQ 314]; Wisconsin-Minnesota Gas & Elec. Household A. Co. v. Hirschy Co., 28 F. 2d 838."

One of the greatest living exponents of patent law, Chief Judge Learned Hand of the Circuit Court of Appeals for the 2nd Circuit, in the case of Philip A. Hunt Company v. Mallinckrodt Chemical Works, 177 F. 2d 583; 83 USPQ 277, has favored the patent bar with a discussion of the law relating to substitution of equivalents as applied to combination claims. The following excerpts from the decision in that case are particularly applicable to the facts in the instant case:

"If the claims were limited to the 'concise and exact terms' in which the specifications ordinarily describe a single example of the invention, few, if any, patents, would have value, for there are generally many variants well-known to the art, which will at once suggest themselves as practicable substitutes for the specific details of the machine or process so disclosed. It is the office of the claims to cover these, and it is usually exceedingly difficult, and sometimes impossible, to do so except in language that is to

> some degree 'functional'; for obviously it is impossible to enumerate all possible variants. Indeed, some degree of permissible latitude would seem to follow from the doctrine of equivalents, which was devised to eke out verbal insufficiencies of claims. Since by virtue of that doctrine a claim will cover whatever will accomplish substantially the same result by substantially the same means, it cannot be that a claim becomes invalid when it states expressly what the courts would in any event imply.
>
> * * *
>
> "Almost all inventions are combinations of old elements, whose selection as a new unit gives them their only importance. Their combination is the end or purpose of the 'invention': its 'nature and design' which the applicant must state. The elements of the combination are the means by which that 'nature and design' is realized; and nobody invades the patent who does not appropriate both end and means. To the extent to which variants, which will be serviceable as substitute means, are known to the art, and at once suggest themselves without need of further substantial experimentation, they are equivalents, and to extend the monopoly to them is not only justifiable but necessary to the protection of the inventor."

Plaintiff respectfully directs attention to the decision of the Circuit Court of Appeals for the 9th Circuit, in R. W. Pointer, doing business as Pointer-Willamette Company v. Six Wheel Corporation, 177 F. 2d 153; 83 USPQ 43, which affirmed the decision of the Honorable Claude McColloch, of the District Court for the District of Oregon, wherein District Judge Yankwich, speaking for the Circuit Court of Appeals, said:

> "These elements combine to produce the same results,—flexibility, equal distribution of the load, avoidance of excessive wear,—which the patent in

suit first taught the art. Whether, as the court found, both were known as proper substitutes for the mentioned elements.—Gould v. Rees, 1872, 15 Wall. 187, 193,—or not, the court found correctly identity of structure on the ground of equivalency." Citing authorities.

District Judge Clark, speaking for the Court of Appeals for the Ninth Circuit in The Filtex Corporation v. Atiyeh, 103 USPQ 197, found that there was but slight difference between the accused device and the device patented by the plaintiff. He held these slight differences to be immaterial, since the devices function in the same way to accomplish the same result. He cited the rule stated in the case of Sanitary Refrigerator Company v. Winters, et al., 280 U.S. 30-42, 3 USPQ 40, 44, and quoted from that decision, as follows:

"except where form is of the essence of the invention it has little weight in the decisions of such an issue; and, generally speaking, one device is an infringement of another 'if it performs substantially the same function in substantially the same way to obtain the same result. * * * Authorities concur that the substantial equivalent of thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape.' Machine Co. v. Murphy, 97 U.S. 120, and see Elizabeth v. Pavement Co., 97 U.S. 126-137. That mere colorable departures from the patented device do not avoid infringement, see McCormick v. Talcott, 20 How. 402-405. A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same device, performing precisely the same offices

with no change in principle, constitutes an infringement. Ives v. Hamilton, 92 U.S. 426-430. And even where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee and cannot be extended to embrace a new form which is a substantial departure therefrom, it is nevertheless infringed by a device in which there is no substantial departure from the description in the patent, but a mere colorable departure therefrom. Compare Duff v. Sterling Pump Co., 107 U.S. 636-639."

The Prior Patented Art

During the prosecution of the application for the patent in suit, the Examiner cited but four prior patents as primary references and but three prior patents as secondary references. The record shows that the patent to Glass was cited against nine of the claims submitted; the patent to Gill was cited against five of the claims submitted; Atcheson was cited against but three of the claims; and Bates was cited against but one of the claims. Hedrick was used as a secondary reference to modify the structure of the primary reference cited against three claims, and Summers was used as a secondary reference to modify the structure of the Bates patent cited against one claim.

Certainly this does not reflect a "highly developed art", and the fact that the Examiner has made use of so few patents against so few of the claims leads us to examine these patents to determine whether specific limitations contained therein were required, or whether the court may nevertheless construe the claims with a scope commensurate with the invention.

The patent to Glass discloses a slide valve wherein a tubular casing A is provided with a groove within which the gate B is seated. A rachet bar C is secured to the back of the gate or slide, indicating that the inlet is at the lower end of the casing as viewed in Figure 1. The gate or slide is equipped with inclined plates *z* which engage wedge shaped lugs *m-m* on each side of the back face of the gate and press the gate tightly against its seat. The gate or slide B is seated in opposition to the pressure of the fluid flowing through the valve, and in this respect is similar to single wedge type gate valves. The recess formed by the groove is on the outlet side of the gate, and, were the valve to be used to control the flow of pulp, the groove would fill with pulp and interfere with the operation of the gate. If the valve were used in a pulp mill and the flow of material reversed, the bonnet K would fill with pulp whenever the gate were closed and seriously interfere with the operation of the rack and pinion, and would hinder withdrawal of the gate from closed position. The Smith invention is not found in the Glass patent.

The patent to Gill discloses a wedge type gate valve wherein the wedge shaped gate 7 is moved in juxtaposition the seat 5 and then urged into seating engagement therewith by the wall 6. The flow of material through the valve is from inlet 3 to outlet 4, and the recess defined by a cutaway portion of the floor of the valve is on the outlet side of the gate. The face of the gate 7 does not scrape the seat 5, but, rather, is urged against the seat with a sudden movement after the gate is almost in wholly closed position. As stated by Mr.

Theodore J. Geisler, attorney for Smith during the prosecution of the application for patent, the groove 9 in Gill "is located on the outlet side of the gate, which, it is submitted, is not the equivalent of applicants' recess which is located on the inlet side of the gate, for the reason that Gill's recess would tend to form an eddy in which material would be liable to accumulate and to be pressed between the valve seat and the gate." There is no disclosure in the Gill patent which would teach Smith how to build the valve of the patent in suit.

The patent to Atcheson discloses a valve such as used to discharge the contents of paper-pulp digesters. The patent shows a box-like structure having a top H and bottom J, respectively. I and I′ are openings through the top and bottom, I being the inlet port and I′ the outlet port, respectively. F is the sliding gate which is pressed against the inner face H′ of the top H of the casing. The gate is set in opposition to the pressure of the fluid flowing through the valve. E (there are two of them) are wedges or inclines mounted on the side walls of the casing to press the gate F into seating relation with the inner surface H′ of the top H. Between the top and bottom walls is an area equal to the cubical area of the box, but which is on the outlet side of the gate. If the valve were set on end, the portion of this area below the level of the openings I and I′ would form a groove as in the patent to Glass.

Insofar as claims 1 and 2 of the Smith application call for a housing having inlet and outlet ports and a gate between said ports slidable in said housing, the

patent to Atcheson is pertinent. But there is no recess in the floor of the Atcheson valve on the inlet side of the gate, such recess being inclined toward the gate in closed position, and the openings I and I′ could be any shape.

The patents to Glass, Gill and Atcheson did not anticipate the structures of the claims against which they were cited. Our knowledge of the art proves these to be representative of the best art available to the Examiner. He cited the best art he had and left it to Smith or his attorney to show how the inventive concept was differentiated therefrom. It is true that it is up to the inventor to make claim to all that he believes himself entitled under the law, but where a claim includes a specific element in a specifically limited form, and such limitation is not required by the general terms of the patent nor by the state of the prior art, the Court may nevertheless construe the claim with a scope commensurate with the invention. I. P. Morris Corporation v. S. Morgan Smith Co., 34 F. 2d 525.

The patents to Glass, Gill and Atcheson as primary references, and the patent to Glass as modified by Hedrick, were disposed of in applicant's response to the first Office action. These patents were not again urged against the claims pending in the application. From then on, having established patentability of the invention, Smith's attorney struggled to so phrase the claims as to avoid rejection on the ground that they were inaccurate or indefinite. The attorney's difficulty in this regard can be appreciated only by reading that portion of the file wrapper beginning with the second Office action.

Modification of Prior Art Structures

Of the prior patents introduced in evidence by the defendant, each of the following listed patents discloses a single wedge type gate valve having a gate with but one face which is seated in opposition to the flow of fluid through the valve,—which is the reverse of the flow of fluid through the Smith valve. A single asterisk after the patent indicates that it shows a full groove all the way around the valve opening. The double asterisk indicates that there is a recess in the floor of the valve on the *outlet* side of the gate. Both Mr. Edwards and Mr. St. George testified that this type of valve would not be acceptable for controlling the flow of pulp in a pulp mill.

Patentee	Number	Full Groove	Recess in Floor of Valve on *Outlet* Side
Belfield	105,027		**
Allt	233,180		**
Lunken	494,579	*	
Lunkenheimer	494,581	*	
Lunkenheimer	494,582	*	
Patterson	985,444		**
Snow	1,179,047	*	
Summers et al	1,379,136		**
Gill	1,613,509		**

With respect to the type of valve shown in the above listed patents, Mr. Paul Theiss, testifying for defendant, said:

> "Q. (By Mr. Buckhorn): Mr. Theiss, does the patent specification disagree with you insofar as the intake and outlet sides are concerned?
>
> A. Yes, it does. * * *

Q. But it is your opinion that any engineer confronted with and having at his disposition a valve of the type shown in the Gill patent would take the end marked B as the inlet end of the valve?

A. Yes."

Mr. Theiss testified three times that the inlet end of the valve shown in the Summers et al patent was at the right-hand end of the valve as shown in Figure 1 of the drawing (Transcript, p. 183). Upon constant urging by defendant's attorney, he agreed that the valve could be operated in the opposite way. But he further testified (p. 184) that the valve is a one-direction valve, and, if this is true, then the flow through the valve must be from right to left as viewed in Figure 1. The patentee so describes it, and says that the flap valve 18 is to prevent a return of the fluid (p. 2, column 1, line 25, of the patent).

Likewise, Mr. Theiss testified that each of the strucsures of the Belfield patent, the Patterson patent, and the Heinecke patent should be installed in a manner opposite to that described by the patentee, and that, if so installed, there could be found parts in respective ones of these patented valves which would be the full equivalent of certain elements of the Smith valve. It will be remembered that both Mr. Edwards and Mr. St. George testified that it would be impractical to reverse the operation of these valves by installing them backwards; but the point plaintiffs are making at this place is that, as stated by the Commissioner of Patents in the matter of the appeal of the party Gee, 261 O.G. 800 (1918):

"In order to negative invention in a novel combi-

> nation it is necessary to find in the prior art not merely a device which might be modified to make this construction, but somewhere a suggestion, *not only that the modification ought to be made but how to make it.*" (Italics added.)

The language of the Commissioner of Patents is quoted with approval by the District Court of Connecticut in the case of Kulp v. Bridgeport Hardware Mfg. Corporation, 19 F. 2d 659 (1927), in which the court held that to negative invention in a novel combination it is necessary to find in the prior art, not merely a construction which might be modified to make the patented device, but a suggestion, *not only that the modification should be made,* but also how to make it.

The Circuit Court of Appeals for the 9th Circuit, in Bankers Utilities Co. v. Pacific National Bank, 18 F. 2d 16, held that anticipation is not made out by the fact that a prior existing device shown in a prior patent may easily be changed to produce the same result as that of the device of the patent in suit, where the prior device was in common use, *without it occurring to anyone to adopt the change suggested by the patent in suit.* To the same effect is the holding of the Circuit Court of Appeals for the 8th Circuit, in Diamond Power Specialty Corporation v. Bayer Co., 13 F. 2d 337, 341, wherein the court said that in considering prior patents as anticipations, *it is not permissible to modify the structures of such patents, and then claim the modified structures as anticipations.*

The decision of the Court of Customs and Patent Appeals in In re Lennie Wells, 414 O.G. 4; 53 F. 2d 537;

11 USPQ 165, seems to be especially appropos in the instant case. The court said:

> "It seems to have been the opinion of both the tribunals of the Patent Office that if the Pyles ratchet clutch were fitted to the Kammerdiner device, and should then be run backwards, appellant's device was fully anticipated * * *. The portion of Pyles' specification, heretofore quoted, plainly discloses that his device is intended to be rotated in one direction only.
>
> "The appellant's claims ought not to be rejected because of the possibility that if the Kammerdiner or Pyles devices were operated in some other manner, similar results would ensue to those secured by the use of appellant's device. It is well said in Topliff v. Topliff et al., 145 U.S. 156, 161: 'It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.'
>
> "An earlier device, which must be distorted from its obvious design, cannot be an anticipation. Block v. Nathan, 9 F. 2d 311."

In the United States Patent Office, the final authority regarding the patentability of alleged invention is the Board of Appeals. Its decisions are final and conclusive, unless appealed to the Court of Customs and Patent Appeals, or a suit is brought in the Court of Appeals of the District of Columbia under the provision of R.S. 4915; 35 U.S.C. Title 35, Sec. 63. The language of the Board of Appeals in Ex parte Halstead, reported at 37 USPQ, page 417, is appropos in the instant case:

"Most inventions are based on known scientific

facts or involve the bringing together, in new combinations, of known elements, but invention is not negatived by a mere showing that the elements are old or by showing that the facts underlying the invention are old, unless it can also be shown that these elements or facts can be brought together in such a way as to produce the claimed invention. As above stated, we are not satisfied that the references here relied upon teach the invention claimed."

Aggregation of Prior Art Elements To Anticipate Invention

The prior art is in evidence to show what was available for defendant's use; but the courts are unanimous in saying that defendant is not permitted to select elements from prior art patents and combine them in the manner taught only by the plaintiffs' patent in violation of the plaintiffs' rights. To grant to a defendant the right to use patentee's teaching as to how to combine separate elements taken from prior art patents does violence to the very purpose and intent of the patent system.

The following extract is taken from Johnson v. Forty-Second Street Railway Co., 33 Fed. Rep. 499; S.D.N.Y. 1888 (Patent No. 117,198 for a railway switch):

"The test to which this patent has been subjected—the test which is usually applied to all contested patents—is certainly severe, and is often misleading and deceptive. The defendant assembles every similar device, description, or suggestion in the particular art not only, but also in analogous, and even in remote arts. Everything which has the least bearing upon the subject is brought in and

> arranged by a skillful expert in an order of evolution which resembles most closely the invention which is the subject of attack. Having thus reached a point where but a single step, perhaps, is necessary to success, and knowing from the inventor exactly what that step is, the expert is asked if the patent discloses invention, and, honestly no doubt, answers in the negative. There is always the danger, unless care is taken to divest the mind of the idea added to the art by the inventor, that the invention will be viewed and condemned in the light of ascertained facts. With his description for a guide, it is an easy task to trace the steps from the aggregation to the invention."

In Bragg-Kliesrath Corp. v. Farrell, 36 Fed. Rep. 2d 845 (CCA 2-1929), the Court, in upholding Dickson Patent No. 1,076,189, for a vacuum power brake, stated:

> "It would reduce patent protection almost to a nullity if an infringer could, in the light of a subsequent disclosure, comb the prior art, and piece together portions of earlier patents, while dropping other parts, and thereby invalidate a new combination of old elements."

Defendant makes no use of any of the prior art valves. Although a very considerable number of valve patents have expired—all of which are available to whomsoever wishes to make use thereof—nevertheless, defendant copied plaintiffs' valve, and now seeks to excuse its acts by saying that the several elements can be found in the prior art.

Plaintiffs' Established Royalty as Measure of Damages

The pecuniary injury which a plaintiff incurrs by reason of a defendant's infringement of his patent is the measure of the damages which that plaintiff is entitled to recover on account of that infringement. Coupe v. Royer, 155 U.S. 565, 582, 39 L. Ed. 263; Goodyear v. Bishop, 2 Fisher 154, 158, Fed. Cas. No. 5,559, C.C., N.Y.; Graham v. Mfg. Co., 24 Fed. 642, 643, C.C. Wis.; Brickill v. Baltimore, 60 Fed. 98, C.C.A. 4. Such an injury is often called the plaintiff's loss. Suffolk Co. v. Hayden, 3 Wall. (70 U.S.) 315, 320, 18 L. Ed. 76; Cowing v. Rumsey, 8 Bltchf. 36, Fed. Cas. No. 3,296, C.C., N.Y.; McColb v. Brodie, 1 Woods 153, 161, Fed. Cas. No. 8,708, C.C., La.; LaBaw v. Hawkins, 2 Bann. & Ard. 561, 563, Fed. Cas. No. 7,961, C.C., N.J.; Duplate Corporation v. Triplex Safety Glass Co. of N. A., 298 U.S. 448, 451, 80 L. Ed. 1274; Beach v. Hatch, 153 Fed. 763, C.C., Mass.

The existing statute for awarding damages for infringement of Letters Patent is 35 U.S.C. 284, which reads as follows:

> "Sec. 284, Damages
>
> "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.
>
> "When the damages are not found by a jury the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

"The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances (R.S. 4919, 4921; 35 U.S.C., 1946 ed., 67, 70.)"

The magnitude of the loss sustained by plaintiff must always be ascertained, in order to ascertain the amount of the damages which he is entitled to recover. To ascertain the extent of the pecuniary injury which a particular infringement has caused a particular plaintiff, it is necessary to ascertain "the difference between his pecuniary condition after the infringement, and what that condition would have been if that infringement had not occurred." Yale Lock Co. v. Sargent, 117 U.S. 536, 552, 29 L. Ed. 954. If he availed himself of his patent by granting licenses to others to do the things which the defendant did without a license, *then that difference consists in his not having received the royalty which such a license would have brought him.* Seymour v. McCormick, 16 How. (57 U.S.) 480, 489, 14 L. Ed. 1024; New York v. Ramson, 23 How. (64 U.S.) 487, 490, 16 L. Ed. 515; Philips v. Nock, 17 Wall. (84 U.S.) 460, 462, 21 L. Ed. 679; Clark v. Wooster, 119 U.S. 322, 326, 30 L. Ed. 392; Tilghman v. Proctor, 125 U.S. 136, 143, 31 L. Ed. 664; Graham v. Mfg. Co., 24 Fed. 642, 643, C.C., Wis.; Timken v. Olin, 41 Fed. 169, 171, C.C., Ohio; Con. Rubber Tire Co. v. Diamond Rubber Co., 232 Fed. 475, C.C.A. 2; Empire Rubber & Tire Co. v. De Laski & Thropp Circular Woven Tire Co., 281 Fed. 1, C.C.A. 3; Muther v. United Shoe Machinery Co., 21 F. 2d 773, 775, D.C., Mass.

The primary method of assessing damages for infringements of patents consists in using the plaintiffs' *established* royalty as the measure of those damages. Clark v. Wooster, 119 U.S. 322, 30 L. Ed. 392; Seymour v. McCormick, 16 How. (57 U.S.) 480, 14 L. Ed. 1024; New York v. Ramson, 23 How. (64 U.S.) 487, 16 L. Ed. 515; Philip v. Nock, 17 Wall. (84 U.S.) 460, 21 L. Ed. 679; Tilghman v. Proctor, 125 U.S. 136, 31 L. Ed. 664; Graham v. Mfg. Co., 24 Fed. 642, C.C., E.D. Wis.; Timken v. Olin, 41 Fed. 169, C.C., S.D. Ohio, W.D.; Con. Rubber Tire Co. v. Diamond Rubber Co., 232 Fed. 475, C.C.A. 2; Empire Rubber & Tire Co. v. De Laski & Thropp Circular Woven Tire Co., 281 Fed. 1, C.C.A. 3; Muther v. United Shoe Machinery Co., 21 F. 2d 773, D.C., Mass.

The courts have always held that *established* royalties are the best measure of damages in patent causes. There is no conflict among the decisions, nor has there been since early pronouncements of the United States Supreme Court. For example, see Seymour v. McCormick, 57 U.S. 481, 489, 14 L. Ed. 1024 (1853) where Mr. Justice Grier wrote the opinion for the Court:

> "Where an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement, he has himself fixed the average of his actual damage, when his invention has been used without his license. If he claims anything above that amount he is bound to substantiate his claim by clear and distinct evidence."

In Clark v. Wooster, 119 U.S. 323, 326, 30 L. Ed. 392, the patentee, Wooster, brought suit against the firm of Johnson, Clark & Co. to restrain infringement of

patent and to recover profits and damages. The decree established infringement. Plaintiff adduced evidence to show that he had established a license fee of ten cents from each folding guide purchased or disposed of, and had granted licenses at that rate to divers sewing machine companies. Defendants alleged error in the court's finding that the measure of damages was an established license fee and that such fee was proved. Mr. Justice Bradley, speaking for the Court. said:

> "The third point, as to the measure of damages, and the want of proof thereof, is equally untenable. It is a general rule in patent causes, *that established license fees are the best measure of damages that can be used*. There may be damages beyond this, such as the expense and trouble the plaintiff has been put to by the defendant; and any special inconvenience he has suffered from the wrongful acts of the defendant; but these are more properly the subjects of allowance by the court, under the authority given to it to increase the damages.
>
> "As to the sufficiency of the proof, we see no occasion to disturb the conclusion reached by the master on this point. The complainant proved several instances of licenses given by him to large sewing machine companies, the fees on which were regularly paid, and corresponded with the rate allowed by the master. We think that the defendants have no occasion to complain of the amount awarded." (Italics added.)

In Faulkner v. Gibbs, C.C.A. 9, 199 F. 2d 635, 95 USPQ 400, Bone, Circuit Judge, an infringement suit was brought on patent No. 1,906,260, issued May 2, 1933, for a game device. The suit was brought in the U. S. District Court of the Southern District of California before Judge Yankwich, who found the patent valid

and infringed. The Circuit Court of Appeals for the 9th Circuit affirmed the interlocutory judgment of the District Court, 170 F. 2d 34. The Supreme Court of the United States granted certiorari and affirmed, 338 U.S. 267; 70 S. Ct. 25; 94 L. Ed. 62. Rehearing denied, 338 U.S. 896; 70 S. Ct. 236; 94 L. Ed. 551. Plaintiff had granted ten licenses which produced annual royalties ranging from $1000 to $3600 per year on sixteen unit banks of machines. The annual unit royalties varied from $20 to more than $40. Some of the agreements recited that the licensees were bound by outstanding injunctions and some of the agreements were made in compromise out of pending infringement suits for past infringement. Two of the agreements were in effect when the defendant began his infringing operation.

These circumstances led the court to hold that the case was not one for application of the established royalty rule, but set forth the following:

> "The statutory provision governing this question is 35 U.S.C.A. 70, the relevant portion of which is set out in the margin:
>
> > "' * * * and upon a judgment being rendered in any case for an infringement the complainant shall be entitled to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, together with such costs, and interests, as may be fixed by the court. * * *'
>
> Save for the omission of any reference to profits as a basis of recovery in infringement cases, this provision makes no change in the long-settled law on the subject. The infringement of a patent is a tortious taking, entitling the injured party to gen-

eral damages, measured ordinarily by the fair value of what was taken, i.e., the privilege of making, using or selling the patented article. *Where an established royalty for a license is proved, this is the best measure of the value of what was taken by the infringement.*

"In order that a royalty may be accepted as 'established' it must have been paid prior to the infringement complained of; it must have been paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have had occasion to use the invention; and it must have been uniform at the places where licenses were issued.

* * *

"Where no established royalty can be proved, it is permissible to show . . . what would have been a reasonable royalty . . ." (Italics added.)

In Reliance Construction Co. et al. v. Hassam Paving Co. et al., C.C.A. 9; 248 Fed. 701, Gilbert, Ross and Hunt, Circuit Judges, suit was brought by Hassam Paving Co., a corporation of Massachusetts, the patentee of patent No. 861,650, and Oregon Hassam Paving Co., a corporation of Oregon, to whom the patentee had granted an exclusive license to use and to vend the right to use the patented invention within the state of Oregon, against defendants, alleged infringers.

The royalty charged by patentee was fifteen cents a yard for use of the patented process for laying pavement. The master found that a royalty of twenty-five cents a yard would be a reasonable royalty for recovery of damages. Defendants contend that the royalty charged by the patentee of fifteen cents per yard should be used

for computation of damages. The Court affirmed the master's findings and held:

> "It is obvious that the sum charged by the patentee as royalty to auxiliary companies, who receive exclusive licenses for a designated territory, and who invest capital and incur the expense of preparing plants, and enter into the business of supplying the patented article, would be an inadequate royalty and measure of damages for infringement. The patentee, in consideration of the benefit which it obtains from the act of cooperation of an auxiliary company, in introducing the patented improvement and exploiting it, thereby securing a far greater return for the use of its invention than could be obtained by dealing with individual users, may well afford to fix a low rate of royalty to such licensees. For the infringer in this case to pay the licensee damages measured in the figures of a royalty of 15 cents would not meet the demands of justice.
>
> "On a basis of 15 cents as a reasonable royalty for damages in this case, if the licensee is entitled to receive and retain the sum paid for damages, the patentee would receive nothing for the use of its patent. If, on the other hand, it is payable to the patentee, the licensee would receive nothing for the invasion of its exclusive rights under the license. We agree with the court below that the master's finding 'is as favorable to the defendants as they can reasonably ask or expect.' "

General Motors Corp v. Blackmore et al., presents a good summary of the doctrine of established and reasonable royalties. Circuit Court of Appeals, 6th Cir., 53 F. 2d 725; Hickenlooper, Circuit Judge. The case was brought on the law side of the court and was reveresd. The court, however, discussed the measure of damages as follows:

> "We accept the position that, where an 'estab-

lished royalty' is clearly shown, that is, a standard rate at which licenses were voluntarily and freely sold, such 'established royalty' must control; but this contemplates an absence of peculiar or special circumstances influencing any specific grant and an open, established market unaffected by attending relationships or collateral interests. Conceding that an 'established royalty' accurately reflects market value, and is the true equivalent thereof, licenses granted at other times, and between other parties, and upon private negotiations, as distinguished from sales upon an impartial basis, may be extremely helpful in determining the reasonable rate to be applied, but cannot be regarded as conclusive of market value. An exception to the general rate—the preferential treatment of one manufacturer, or even of a number of manufacturers who take out licenses—does not entitle an infringer to precise equality of treatment. The patentee may still recover such sum as would have been reasonable under all the circumstances of the case. And so, too, if there has been a general infringement, and the patent is in wide disrepute and openly defied, these individual and private compacts may even lose much of their probative force as indicating the reasonable royalty. This supposed condition of the market would not affect the amount of an established royalty, if such had been shown, even though it had caused such established royalty to be publicly fixed at a lower rate than would otherwise have been done; but that diminished royalty rate to which the patentee may have been driven in individual cases by the disrepute of his patent and the open defiance of his rights should likewise not be taken as the true measure of a reasonable royalty where no established royalty is shown. The reasonable royalty must still be determined from proofs of acceptance, utility, value, and demand, and upon the hypothesis that the patent was valid and would be respected. Compare Consolidated Rubber Tire Co. v. Diamond Rubber Co. (D.C. So. Dist. N.Y.—Judge Learned Hand), 226 F. 455."

Inadequacy of Damages Awarded by District Court

The District Court found that "a reasonable royalty of 1½% of the total sales price of all the valves manufactured and sold by defendant between April 13, 1950 and May 14, 1952." Total sales by the defendant during said period was $197,476.73 [Finding of Fact No. XVIII, p. 32, Transcript].

In 1938 a license was granted to Crane Company, and in 1939 a license was granted to Crane Company of Canada. These were exclusive licenses, save for the eleven Western states of the United States. Each of the licensees paid a royalty of 5% of the total sales price of the Smith valves. Crane Company advertised the valves in trade journals and magazines having nation-wide distribution. Plaintiffs' Exhibit No. 21 was taken from a copy of Time Magazine published at about the time of the trial of this cause.

Defendant's infringing valves rode to market on the wave of popularity of the Smith valve. The structure was well known to the trade—every pulp and paper mill on the North American continent is equipped with Smith valves for controlling the flow of pulp. Defendant not only infringed the Smith patent but it also trespassed the exclusive rights of the several licenses. To borrow the language of the Court of Appeals for the Ninth Circuit in Reliance Construction Co. et al. v. Hassam Paving Co. et al., 248 Fed. 701:

> "For the infringer in this case to pay the licensee damages measured in the figures of a royalty of 15 cents would not meet the demands of justice."

Likewise in this case, the demands of justice are not fully met by assessing damages against the defendant in the figures of the royalty paid by the legitimate licensees; and the District Court surely erred in granting to defendant a pecuniary reward for its unlicensed appropriation of plaintiffs' property.

Damages in Figures of Royalty Paid by Western Machinery Company

On December 4, 1945, plaintiff Walter G. E. Smith entered into an agreement with Western Machinery Company whereby he appointed the Western Machinery Company the exclusive agent to manufacture and sell gate valves under the Smith patent No. 2,001,271 throughout the eleven Western states. The contract provided:

> "2. First Party shall forthwith deliver to Second Party all of his drawings, patterns, specifications and other data applicable to the manufacture of said gate valves and hereby authorizes Second Party to use said property in connection with the manufacture of gate valves during the term of this contract. * * *
>
> "6. Second Party agrees to pay First Party a royalty of twelve and one-half (12½%) per cent of the net selling price of all gate valves sold by it. * * *

The aforementioned agreement is plaintiffs' Exhibit No. 12. The District Court is in possession of evidence of the value of said drawings, patterns, specifications and other necessary and useful data applicable to the manufacture

of gate valves embodying the invention disclosed by patent No. 2,001,271.

Western Machinery Company agreed to pay a rental fee for the use of said drawings, patterns and specifications in the figures of a royalty on sales of said gate valves of 7½% [Finding of Fact No. XX]. This was in addition to the royalty of 5% which Western Machinery Company paid for the right, license and privilege of manufacturing and selling the Smith valve.

The judgment of the District Court makes no award of any damages whatever for Smith's loss of rental fees caused by the trespass by defendant on the exclusive rights of licensee, Western Machinery Company. The loss of these rental fees is the pecuniary injury which the plaintiff Smith suffered by reason of defendant's infringement of his patent, and is the measure of damages which Smith is entitled to recover on account of that infringement. Smith availed himself of his patent by granting licenses to others to do the things which the defendant did without a license. The difference between Smith's pecuniary condition after the infringement and what that condition would have been if the infringement had not occurred consists in his not having received his share of the royalties which his license to Western Machinery Company should have brought him. If these damages may be assessed by using Smith's established rental fee as the measure of these damages, then Smith is entitled to recover from defendant 7½% of the amount of defendant's sales in the eleven Western states, to-wit: 7½% of $179,617.93, which amounts to $13,471.34.

CONCLUSION

The Smith structure was a new type of valve produced for a large and important industry as a solution for a troublesome problem. It was unlike any valve used by that industry before the summer of 1930. It was not a double wedge-type gate valve nor yet a single wedge-type gate valve, and certainly was not a plug-type valve, nor a Reed valve having a piston and cylinder construction. And, since it was not one of these types of valves, it cannot be classified as an improvement therefor.

The Smith valve is unlike anything produced by the prior art, so is not an improvement for anything to be found in the prior art. The patent is a pioneer patent, in that its structure is the first of its kind ever made available to the users of valves. As was said by the Supreme Court in Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U.S. 399, 25 S. Ct. 697, 700:

> "It is well settled that a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, * * *."

All the structural features of plaintiffs' valve, which differentiate it from the valves known and in use prior to December 3, 1930, have been appropriated by the defendant as the essential features of the infringing valves.

[3]There is substantial identity, constituting in-

fringement, where a device is a copy of the thing described by the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing." Burr v. Duryee, 1 Wall, 531, 573.

"Except where form is of the essence of the invention, it has little weight in the decision of such an issue; and generally speaking, one device is an infringement of another 'if it performs substantially the same function in substantially the same way to obtain the same result.'" Machine Co. v. Murphy, 97 U.S. 120, 125.

"A close copy which seeks to use the substance of the invention and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an invention." Ives v. Hamilton, 92 U.S. 426, 430.

These pronouncements, found in early decisions of the Supreme Court of the United States, remain the law of the land to the present date. Defendant's differences in form, with no differences whatever in function or in relation to each of the other elements of the combination, constitute only "such variations as are consistent with its being in substance the same thing." Let the Honorable Court be not persuaded that parallel rings are otherwise than "grooves formed in the side walls of the housing", and that the cutaway portion of the ring on the inlet side of the gate constitutes anything other than "cavities connecting with said grooves in which to receive the material scraped off by the gate while being

closed." The "transverse wall" in the Smith patent is a *seating ledge* in defendant's valve, and without any new or unusual function attributable to a particular shape of opening, an opening of any one shape is the equivalent of an opening of any other shape in these valves. The location, purpose and function of these and other essentian elements are the same in plaintiffs' and defendant's structures.

To warrant a decision in favor of defendant will require that the Honorable Court find that plaintiffs' patent is of extremely narrow scope and that its range of equivalents is nil. In view of the fact that only ten out of the twenty-six claims submitted during prosecution of the application for Letters Patent were rejected on any art whatsoever, and that it was incumbent upon patentee (acting through his attorney) only to so word the remaining claims as to avoid the Examiner's objections that they were indefinite or inaccurate, it is clear that the record does not support defendant's contention that the file wrapper establishes that the invention is but a narrow improvement and not entitled to the benefit of the law relating to substitution of equivalents.

Plaintiffs respectfully contend that in equity and justice plaintiffs are entitled to judgment against defendant for wilfull infringement of the Smith patent, No. 2,001,271, and that plaintiffs recover damages in figures of royalties computed as follows:

For the United States National Bank of Portland, Oregon, Trustee, 5% of $197,476.73	$ 9,873.84

For Walter G. E. Smith, 7½% of $179,617.93	13,471.34
Total damages	$23,345.18

Respectfully submitted,

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NO. 14422

United States
COURT OF APPEALS
for the Ninth Circuit

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, *Appellants,*

vs.

FABRI-VALVE COMPANY OF AMERICA, a corporation, *Appellee.*

FABRI-VALVE COMPANY OF AMERICA, a corporation, *Appellant,*

vs.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, *Appellees.*

BRIEF FOR DEFENDANT-APPELLEE AND CROSS-APPELLANT

Appeals from the United States District Court for the District of Oregon.

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THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, *Appellees.*

BRIEF FOR DEFENDANT-APPELLEE AND CROSS-APPELLANT

Appeals from the United States District Court for the District of Oregon.

JURISDICTION

The jurisdiction of the District Court in this action for patent infringement is based upon the patent laws of the United States of America (R. 4).

This Court's jurisdiction to review the Final Judgment (R. 35) arises under 28 U.S.C. §1291.

STATEMENT OF THE CASE

Plaintiff-Appellants appeal from a judgment (R. 35) awarding damages for infringement of claim 3 of the patent in suit, which was entered upon two Oral Opinions (R. 19 and R. 22) and Findings of Fact and Conclusions of Law (R. 24). The amount of damages is set forth as the error in Plaintiff's Notice of Appeal (R. 37), but in Plaintiff's Statement of Points on Appeal (R. 42) additional errors are set forth, including the Court's holding of noninfringement of claims 1, 2, 5 and 6 of the Smith patent. Defendant-Appellee filed a Notice of Appeal (R. 40) and Statement of Points on Appeal (R. 42) with respect to the Court's finding of infringement of claim 3 of the patent in suit.

The District Court for the District of Oregon held that Patent No. 2,001,271 in suit was not infringed as to claims 1, 2, 5 and 6, and was infringed as to claim 3 (R. 34). The patent in suit was issued May 14, 1935, and expired May 14, 1952, prior to conclusion of the trial. The validity of the patent was not an issue of the trial. The sole issues on appeal are infringement and the amount of damages. Claim 4 of the patent in suit has never been at issue, the charge of infringement being limited to claims 1, 2, 3, 5 and 6 (R. 19).

Two different types of valves manufactured by defendant are charged with infringement, the bonnet type (Type A) (D. Ex. D., Plate 2) and the bonnetless type (Type B) (D. Ex. D., Plate 3). These two types of valves are described in general terms in Findings VII

to X (R. 27). The valve illustrated in the patent in suit is also illustrated in D. Ex. D., Plate 1, and described in Finding VI (R. 26).

The gate valve of the patent in suit is designed particularly for use in pulp mills and more particularly for controlling the flow of pulp stock through pipelines (Finding V, R. 26). According to Finding XI (R. 29), gate valves were highly developed by the prior art more than one year prior to the filing of the application which matured into the Smith patent in suit.

ANALYSIS OF THE CLAIMS

The elements of the claims are set out below, together with appropriate comments.

1. All claims call for a "housing provided with inlet and outlet ports." It is undeniable that all valves have a housing provided with inlet and outlet ports;

2. All claims call for a "gate slidable between said ports." The gate is designated by the letter h in the patent. The gates of defendant's valves are designated by the numeral 14 in Plates 2 and 3 of D. Ex. D. Gate valves were highly developed long prior to the Smith patent;

3. All claims specify that the gate is slidable "in grooves formed in the side walls of said housing." These grooves are designated by the small letter g in the patent. In defendant's valve Type A (Plate 2) the gate is guided between a ring 15 welded to the inner surface

of the wall of the valve body on the outlet port side and a similarly situated partial ring 16 on the inlet port side. A guideway is thus formed, but not "grooves formed in the side walls of said housing." The gate is guided in defendant's valve Type B (Plate 3) between the annular shoulder 15 formed by the smaller diameter portion of the welded valve housing on the outlet port side and the larger diameter portion of the inlet port side of the valve housing; which likewise is not "grooves formed in the side walls of said housing." Having the grooves formed in the side walls is an important feature of Smith's valves since, as seen most clearly in Fig. 5 of the patent, the walls of the valve body are not obstructed by protruding rings as in defendant-appellee's valves (D. Ex. D., Plates 2 and 3). In defendant-appellee's valves the rings 15 and 16 in Type A, and the inwardly protruding portions 15 of part 22 and 16 of part 21 in Type B, constrict the passages and create turbulence;

4. Claims 1, 2, 5 and 6 state that the side walls of the inlet side of the valve are provided "at the bottom with cavities connecting with said grooves." These cavities in the bottoms of the side walls and connecting with the grooves are designated by the small letter m in the Smith patent. These recesses are formed into the side walls of the valve as seen most clearly in Fig. 5 of the patent. There is no corresponding structure in either type of defendant's valves. This express limitation is found in each of claims 1, 2, 5 and 6, together with the following statement of purpose thereof, "in which to receive the material scraped off by the gate while

being closed." The recessing of the side walls in this manner is necessary because the grooves in the unobstructed side walls of the valves provide quiet areas in which deposits build up, and these grooves extend in a straight line from top to bottom of the valve so that considerable deposits are formed. This important element of the claimed combination and its function is not present in either type of defendant's valves. The Court correctly found that such "cavities" are essential elements of claims 1, 2, 5 and 6, and that these claims were not infringed;

5. Claims 2 and 6 are further limited to "the floor of the inlet side of the housing inclining downward toward the cutting edge of said gate when in closed position." This element is not present in defendant's gate Type A. It is present in defendant's gate Type B;

6. Claims 3, 5 and 6 contain the following limitation: "a transverse wall separating the inlet and outlet ports, ..." The words "transverse wall" are not found in the specification of the Smith patent. However, it is clear that Smith is referring to the wall portions 1', as described in page 1, column 2, line 53, and page 2, column 1, line 10 of the patent. This transverse wall is recited *in addition to the grooves formed in the side walls of the valve housing;*

7. Claims 3, 5 and 6 also include the following: "such wall provided with an opening, the gate sliding against said wall, the lower end of said opening formed V-shape,". Again, no exactly equivalent wording is found in the specification of the Smith patent, but it is certain

that reference is being made to the peculiar formation of the outlet port f as being "V-shaped at the bottom, as at 1," (page 1, column 2, line 50, to page 2, column 1, line 15). No equivalent V-shaped bottom of the outlet port is present in either of defendant's valves. Emphasis is placed on the fact that there are present in these claims the three separate elements of grooves in which the gate is guided, a wall against which the gate slides, and a V-bottomed opening in the wall.

The foregoing conclusions with respect to the meaning of the claims are supported by the phrases found in each of these claims, as follows: "the gate sliding against said wall" and the dual functional statement "whereby said wall supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed, and the cutting edge of the gate makes relatively an oblique cut through the material located in said opening."

THE COURT'S ERROR

The Court incorrectly decided that the cylindrical outlet port body portions of defendant's valves, being circular in cross-section, were U-shaped at the bottom. *A semicircle is not U-shaped.* The Court erroneously concluded that, since claim 3 was not limited to the "cavities", and since a "V" and a "U" are sometimes interchangeably used in printing and inscriptions (Opinion, R. 21), (Opinion, R. 23), (Finding XII, R. 30), claim 3 was therefore infringed. (Judgment II, R. 35).

The Court erred in broadening the scope of claim 3 and thus finding equivalency, since the Court overlooked the fact that these express limitations were necessary to define over the prior art, and overlooked the abandonment of claims urged during the prosecution of the application which could have been entitled to broader interpretation, and other factors.

THE FILE WRAPPER AND CONTENTS

Claims originally presented by Smith were rejected in the first Office action dated April 15, 1931, on prior art including the patents to Glass, Gill, Atcheson, Hedrick and Mawby (D. Ex. B1, B2, B3, B4, and B5). At the bottom of the first page of the first official action, the Patent Office Examiner made the following statement (D. Ex. A., page 17):

> "Claims 6, 7 and 8 are rejected as lacking invention over Gill, who shows the gate guide grooves cut away for the purpose of preventing accumulation of debris, and to use such means on the inlet side would realize no new or unexpected result."

The original claim 7, rejected above, appears on page 11 of the file and reads as follows:

> "7. In a gate valve, the combination of a housing having opposite inlet and outlet ports, a gate located between said ports and slidable in the housing, said gate being beveled on the inlet side at its lower edge, a recess in the floor of said housing on the inlet side of said gate, said recess gradually increasing in depth to said gate and extending laterally whereby the walls of said side groove of the gate are cut away by the recess on the inlet side, and means for operating said gate."

This claim therefore clearly and definitely defines a structure including the housing, a knife-edged gate guided in the housing, the recess defined by the sloping bottom indicated at J in the Smith patent, and the cavities indicated at m in the Smith patent.

Pursuant to the first Office action, Smith filed an amendment in which he cancelled claims 1, 2, 3 and 6 to 11 inclusive, and added a new series of claims, all of which were limited as in the patent claims. In the argument appended to the first amendment and beginning on page 22 of the file (D. Ex. A), Smith distinguished the structure of the patent application over the prior art. Particular attention is directed to one sentence appearing slightly below the center of page 23, and reading as follows: "Gill shows a semicircular valve seat and obviously there is no scraping action as the gate closes on it." In these words Smith's attorney disclaimed any rights with respect to a gate valve having a semicircular seat at the bottom. The claims are thus expressly limited to a valve having a clearly defined transverse wall in which there is a V-bottomed opening. Moreover, on page 24 of the file the following additional statement was made by Smith: "The patent to Hedrick, 988,777, shows a gate valve having a rectangular opening in which the gate is slidable and, *while the bottoms of the grooves are cut away,* no recess is provided in the floor of the valve housing *nor is the outlet side formed V-shaped at the bottom.*" (Italics ours). Again, Smith's attorney pointed out in no uncertain terms that he was not making any claim to a valve having a round opening on the outlet side of the gate. The significance of the

V-shaped opening is stressed in Smith's specification beginning on page 1, column 2, line 50, and continuing to page 2, column 1, line 10 of the patent. Further than that, Smith, in describing the improvement which he had devised, admitted that gate valves with cylindrical outlet ports were old (patent page 1, column 1, lines 16 to 24). Therefore, even though the arguments presented in behalf of the claims which were finally allowed are overlooked, the fact that Smith cancelled claims readable upon cylindrical outlet ports is overlooked, and the express limitations of the claims and statements of the functions performed by the expressly defined parts are overlooked, the Court is nevertheless clearly in error since the Court's broad interpretation of claim 3 is barred by the positive disclaimer in the specification of the patent.

Claim 3 of the patent expressly stipulates "the lower end of said opening formed V-shaped, whereby said wall supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed, and the cutting edge of the gate makes relatively an oblique cut through the material located in said opening." In this respect claim 3 of the patent closely resembles original claims 3, 4 and 5 of the application as filed, and which were allowed in the first Office action by the Examiner. Original claims 3, 4 and 5 all refer specifically to the V-shaped bottom on the outlet side of the gate. In order for the original claims 3, 4 and 5 to have been found allowable, they must have recited certain structural features which were not present in the rejected claims which were cancelled. In other words, claim 3 of the

patent depends entirely for its allowability and validity upon the specific stipulation of the transverse wall and the lower surface of the valve outlet opening being formed V-shaped, in addition to any means forming grooves to guide the gate.

TESTIMONY OF THE INVENTOR

Mr. Smith, the inventor, and a witness for plaintiff, testified (R. 77) that his first valves were provided with round outlet openings, and that the pressure of the fluid bowed the gate and caused it to shave the surface of the seat of the valve. He testified that when he made the bottom with a V-shaped section (as disclosed in the patent) there was no wear on the valve seat (R. 78). Mr. Smith admitted that gate valves which he had experimentally built prior to providing the transverse wall and the V-shaped bottom, and which were provided with rectangular gates, were noted to have the gates bowed toward the valve seat and their edges turned (R. 85-87). He testified that there was attrition of the valve seat which was avoided by changing the shape of the opening to a V-shape (R. 87).

COMPARISON OF PLAINTIFF-APPELLANTS' PATENTED VALVE AND DEFENDANT-APPELLEE'S ACCUSED VALVES

The two types of valves manufactured by defendant-appellee are correctly described in Findings of Fact VII and VIII (R. 27, 28). These agreed facts include the

fact that the gates are provided with semicircular, lower ends which are beveled for the purpose of scraping accumulated pulp stock from the face of the seating ledge. This type of valve is admitted by the patentee to be old in the specification of his patent (patent page 1, column 1, lines 16-24), was disclaimed in the prosecution of the patent (D. Ex. A., pages 22-24), and does not present the problem for which Smith was forced to design the transverse wall with the V-bottom opening.

The reason that Smith was forced to provide the transverse wall in addition to the guiding grooves in the sidewalls of the housing, is as follows. The gate in Smith's patent is rectangular. When such a gate is lowered to a point immediately above a straight, horizontal seating ledge in the bottom of the valve, the entire surface of the gate is subjected to the fluid pressure in the conduit. This means that the central portion of the sharp edge of the gate may be bowed considerably toward the outlet side of the valve, resulting in the shaving of the seating ledge and turning of the gate edge about which Smith testified in court (R. 77, 78). Defendant-appellee's gates, on the other hand, being semicircular, and being supported at the sides by circular rings or equivalent, do not present this problem. In such a construction the space between the lower semicircular edge of the gate and the lower semicircular surface of the valve body is a crescent with its points upward and at the same level. This crescent is constantly reduced in size as the gate is lowered. The extent of engagement of the side edges of the gate with the guiding ring increases progressively as the gate is lowered. The unsupported,

lower edge of the gate between the points of the crescent progressively diminishes in width as the gate is lowered. This means that the gate may be brought to its closed position without the ledge being shaved or the lower edge of the gate being turned.

Furthermore, Smith strove for and developed a valve capable of withstanding high pressures, up to 150 pounds per square inch (Smith's testimony, R. 87. See also Smith's testimony, R. 70-72, 77). He later found that such high pressures would rarely be encountered, and in fact the usual pressures were under thirty pounds (R. 87). But the fact remains that the patent was granted on features which Smith developed to withstand high pressures. Defendant's valves, on the other hand, were designed for the usual low pressures. All that defendant did was to rearrange or reassemble desirable features of low pressure gate valves found in the prior art as exemplified by the Gill patent of 1927, the Summers patent of 1921, the Snow patent of 1916, and the Hedrick patent of 1911. The Court was correct in finding that "The defendant's valves are not Chinese copies of the patented structure." (Oral Opinion, R. 22-23). Defendant's witness Thiess testified that valves of the Hedrick patent type were in common use for pulp control as early as 1929 (R. 92, 93) and that such valves had substantially all of the features of the Hedrick valve except the cavities 10 in the side walls (R. 94). This was unrefuted. The use of the cavities of the Hedrick patent was freely open to the public even then because the Hedrick patent had expired in 1928.

Defendant-appellee's valves, therefore, not only do not have structure equivalent to or corresponding to the transverse wall with the V-bottom opening, but have never had any need for such a construction or any equivalent construction. Thus, one of the principal elements upon which the Smith patent was allowed is not present and there is no necessity for its being present. Smith is now trying to assert inclusion within the scope of his patent of the structure which he admitted to be old prior to his patent, and which never did have the problem which he solved in providing the transverse wall with the V-bottom opening.

ARGUMENT

It is axiomatic in patent law that a claim is to be read in connection with the specification, and where the claim uses broader language than the specification, reference may be had to the latter to limit the claim. *Schnitzer et al. dba Alaska Junk Company v. California Corrugated Culvert Company et al.*, C.A. 9 (1944), 140 F. 2d 275. The foregoing decision is also quoted in regard to the following:

> "While it is the rule in this Circuit that admissions made by the applicant to the Examiner are not to be used to narrow the scope of his claim *unless he has made changes in his application pursuant to the Examiner's suggestions,* yet the proceedings may be used to aid in construing the claim, (Warren Bros. Co. v. Thompson, 9 Cir., 293 F. 745.)" (Italics ours)

It is believed that the foregoing is true of the practice in the Ninth Circuit as of today. Smith made such changes.

The claim is to be read in connection with the specifications. *Carnegie Steel Co. v. Cambria Iron Co.,* 185 U.S. 403, 432; *American Fruit Growers v. Brogdex Co.,* 283 U.S. 1; *Schriber-Schroth Co. v. Cleveland Trust Co.,* 311 U.S. 211. Where the claim uses broader language than the specifications, reference may be had to the latter for the purpose of limiting the claim. *McClain v. Ortmayer,* 141 U.S. 419; *Magnavox Co. v. Hart & Reno,* 9 Cir., 73 F. 2d 433; *Lanyon v. M. H. Detrick Co.,* 9 Cir., 85 F. 2d 875.

It is directly in point that the Ninth Circuit Court said the following in *Schnitzer et al.,* supra:

> "The file wrapper contains evidence that the inventor understood this element of his claim in the narrower sense. During the proceedings before the Patent Office, two of the claims were rejected on Anderson, No. 811,812, and the inventor undertook to differentiate Anderson's invention, saying: 'Anderson . . . does not show a packing having a flanged clamp in the sleeve.' Anderson employed a U packing fitted into a seat similar to the one found in Appellants' device."

In the recent Ninth Circuit decision, *Kwikset Locks, Inc. v. Hillgren,* decided February 3, 1954, and reported at 100 USPQ 289 (Advance Sheet), the foregoing principles with relation to infringement received confirmation as follows:

> "The District Court further found that the knobs manufactured and sold by Hillgren infringed Kwik-

set's doorknob patent in that they were mere 'colorable variations' and 'mechanical equivalents' of Kwikset's invention. While it is true that a District Court's finding of infringement is generally considered to be a finding of fact that may not be set aside unless clearly erroneous. 'it is [also] well settled that where, as here, there is no dispute as to the evidentiary facts, and the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of law, depending upon a comparison between the two processes and the correct application thereto of the rule of equivalency. The testimony in this case was largely expository and descriptive of the elements and operation of the two processes and was not disputed.' Kemart Corp. v. Printing Arts Research Lab. Inc., 9 Cir., 1953, 201 F. 2nd 624, 627, 628; United States v. Esnault-Pelterie, 1938, 303 U.S. 26, 30.

"In the Hillgren knob the edge of the shell does not curl, but rather directly faces the insert. See diagram in margin. Thus the 'curl' or 'annular portion' which is a distinguishing characteristic of the Kwikset knob, is absent from the Hillgren knob. - - - - The Kwikset knob patent is in a crowded field; therefore, its scope must be narrowly limited. Since the Hillgren knob construction is based solely upon the tongue-in-groove principle in such a way as to eliminate the need for spring-back pressure employed in the Kwikset knob to hold the cap in place, we conclude that the Hillgren knob does not infringe the Kwikset patent."

The Court correctly found that gate valves were highly developed in the prior art more than one year prior to the filing of the application which matured into the Smith patent in suit (R. 29); that claims 1, 2, 5 and 6 of the patent in suit are limited to cavities in the side

walls of the body communicating with the grooves, which cavities are not present in either of the valves of the defendant (R. 29); and that the patent was entitled to a very narrow range of equivalents (R. 30). But the Court incorrectly ignored the principles set forth in the above-cited decisions of this Circuit, the United States Supreme Court and other Circuits, in construing claim 3 (R. 30). The entire record of the patent, including cancellation of claims not limited to a transverse wall with a V-bottom opening, the specification of the patent as filed, and the arguments in the amendments, clearly shows that Smith understood his claims to be limited strictly to a V-shaped opening in a transverse wall, in addition to any means forming grooves at the sides. The transverse wall with its V-bottom opening, is an element entirely lacking from defendant-appellee's valves, equivalent structure is not present in defendant-appellee's valves, and there is no need for such structure since its function is not necessary. Accordingly the finding of the Court with respect to claim 3 is clearly erroneous and should be set aside.

DAMAGES

Finding of Fact XII expressly acknowledges that ordinarily the Court would consider other contracts entered into by the claimants as a proper standard upon which to determine a reasonable royalty. The Court, however, set a very low royalty "in view of the facts hereinbefore set forth and the fact that the patented structure represented only a minor improvement in a

highly developed art" (R. 30). This is likewise a finding that may not be set aside unless clearly erroneous. Defendant-appellee contends that the Court's statement that the patented structure "represented only a minor improvement in a highly developed art" is correct, and therefore the finding of infringement with respect to claim 3 should be set aside. Nevertheless, in the event that the finding of infringement is sustained, defendant-appellee believes that the Court was clearly within its rights in setting the rate of damages, and the amount of damages should not be disturbed. *Uihlein v. General Electric Co.* (C.C.A. 7), 47 F. 2d 997; *Horvath v. McCord Radiator and Manufacturing Company et al.* (C.C.A. 6), 100 F. 2d 326, c.d. 308 U.S. 581, 84 L. Ed. 486.

Although there is some evidence of higher royalties being specified in previously granted licenses, the evidence is to the effect that the royalty was not uniform, and therefore the established royalties cannot be used as a basis to prove damages. *Rude v. Westcott,* 130 U.S. 152, 167. A single license is not sufficient to establish a royalty, because one purchaser may give a larger sum for a license than he or any other person could well afford to pay, whereas such a business error is not likely to be made by a considerable number of persons when buying licenses under the same patent. The unanimous acquiescence of a considerable number of men in a particular royalty is evidence of its substantial justice, while the acquiescence of one only of the same men would have no convincing force. *Muther v. United Shoe*

Machinery Co., 21 F. 2d 773, 775. *Walker on Patents*, Deller's Edition, Section 823.

Furthermore, the efforts of plaintiffs-appellants to show that there were three licenses at five per cent (5%) of the total sales price of the gate valves were misleading, there being actually only one license under the United States patent at that royalty rate, namely the license to Crane Company of America at Chicago, Illinois. The license to Crane Company of Canada at Montreal, Canada, should be considered as part of the same transaction since the two are related companies, and in any event should not be considered as establishing a uniform royalty by two licenses under the United States patent since the license was limited to Canada. The fact that Western Machinery Company of Portland, Oregon, also apparently agreed to pay five per cent royalties is not to be taken as establishing two United States licenses at five per cent, since the five per cent royalty is only part of a twelve and one-half per cent charge imposed on Western Machinery Company, of which five per cent was stated to be for patent royalties and seven and one-half per cent stated to be for rental of drawings, patterns, specifications and other data applicable to the manufacture of gate valves. It is quite usual for licensors to grant the right to use drawings, patterns, specifications and other data, but usually there is no division of the royalty into so much for patent royalty and so much for rental of the latter items. At best, the situation is established that there were two effective licenses under the patent in suit, one specifying five per cent royalties and the other specifying twelve

and one-half per cent royalties, and these licenses furthermore were limited to different parts of the country.

Ordinarily the requirement of uniformity excludes from consideration all such licenses as were given at variant rates, for no better reason than variant ability on the part of the licensees to negotiate for a license or to resist a suit for infringement. *United Nickel Co. v. Railroad Co.,* 36 Fed. 186, 190. In *American Sulfite Pulp Co. v. De Grasse Paper Co.,* 193 Fed. 653 (C.C.A. 2) the lowest royalty was arbitrarily adopted as the basis of damages, and in *Horvath v. McCord,* supra, the Court arbitrarily set a rate lower than the proven uniform rate.

PLAINTIFF-APPELLANTS' BRIEF

Defendant-appellee has carefully read the brief of plaintiffs-appellants and believes that the foregoing completely meets and answers every bona fide argument advanced therein. Attention is called to the attempt therein to distort terms used in the claims to read on the accused valves (pages 10-11), and the statement on page 10 that "Defendants' gate valve bonnetless type B is substantially a Chinese copy of the Smith valve." The facts are otherwise, as the lower Court expressly found (R. 22-23).

Also, plaintiff-appellants' attempted distortion of the Smith patent relative to the cavities m in the side walls (Brief pages 26-28) is clearly refuted by Fig. 5 of the Smith patent.

Attention is also called to plaintiff-appellants' efforts, in pages 16-20 of the Brief, to create the impression that the patent actually covers something other than it does. Contrary to pages 16 and 17, gate valves in which pressure seated the valve on the outlet side were long known (Hedrick patent), and which had knife edges (Brooks patent). Where, in the patent claims, is there any reference to the length of the gate valve, or stuffing boxes, or bonnets, as described in page 19? And no mention is made of several express limitations of the claims, such as, for example, "opening formed V-shape."

In fact the brief, very significantly, discusses the *objects* of the patent, advantages of the valve *illustrated* in the patent, and portions of the *specification* of the patent; but *does not advance a solitary argument based upon the claims of the patent. Schnitzer et al. v. California Corrugated Culvert; Warren Bros v. Thompson; Carnegie Steel v. Cambria Iron; American Fruit Growers v. Brogdex; Schriber-Schroth v. Cleveland Trust;* all supra.

CONCLUSIONS

1. The Court was clearly erroneous in finding infringement of claim 3, and this finding should be set aside;

2. The Court was clearly correct in finding non-infringement of claims 1, 2, 5 and 6, and this finding should be sustained;

3. In the event that infringement is found, the findings of the Court as to the amount of damages should not be disturbed.

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NO. 14422

United States
COURT OF APPEALS
for the Ninth Circuit

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, *Appellants,*

vs.

FABRI-VALVE COMPANY OF AMERICA, a corporation, *Appellee.*

FABRI-VALVE COMPANY OF AMERICA, a corporation, *Appellant,*

vs.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, *Appellees.*

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Appeals from the United States District Court for the District of Oregon.

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NO. 14422

United States
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THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, TRUSTEE, and WALTER G. E. SMITH, *Appellants,*

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

The File Wrapper and Contents

Plaintiffs-Appellants respectfully direct the Court's attention to the fact that only in the first three Office actions handed down by the Commissioner of Patents

were citations made of prior art patents against the claims pending in the Smith application, and in the third action only one claim was rejected as being met by the prior art. From the very beginning applicant's attorney and the Examiner at the Patent Office endeavored to come to an agreement regarding the accuracy and definiteness of the claims—the Examiner repeatedly pointing to the inaccuracy or indefiniteness, and the attorney attempting to cure these defects by presenting new claims. The Examiner found novelty and invention in the valve from the very first, as evidenced by the history of the prosecution of the application as contained in the file wrapper.

Claims 3, 4 and 5, presented with the application as filed, were declared to be allowable on the first Office action. In the amendment responsive to the first Office action, claim 3 was cancelled, apparently inadvertently, and for some reason the attorney attempted to amend claim 5 and succeeded only in rendering this claim inaccurate, for which reason it was rejected in the following Office action.

In the second Office action, the Examiner's rejection of claim 3, supported by the statement that both Atcheson and Glass provided a recess on what may be considered the inlet side of the valve, was obviously in error, and the claim should have been reinstated in the application. The previously allowed claim 5 was rendered inaccurate by the amendments entered therein, and was rejected because of the inaccuracy. Claim 12, presented in the amendment in response to the first Office action, was allowed, and claims 13, 14, 15 and 16

were rejected, *not as unpatentable over any prior art,* but as indefinite in failing properly to define the invention.

In the third Office action, the Examiner directs attention to the fact that claims 1 to 3 and 5 to 11 have been cancelled; that claim 4 appears to be allowable; and that claims 12 to 18 and 20 are rejected as indefinite. The applicant, by means of his "whereby" clause, is saying that *a recess removes the material lodged in the recess.* Only claim 19 is rejected on the prior art. However, instead of correcting the indefiniteness of the claims by appropriate amendments, the attorney for applicant cancelled all of the claims, including the allowed claims, and substituted therefor the claims now appearing in the patent as issued.

It is important to note that the majority of Smith's claims were not rejected on the prior art. The primary reason for the rejection of the claims in the Smith application was that the claims as drawn were indefinite and inaccurate.

Original claims 1 through 11 were presented with the application as filed, and constitute a part of the disclosure of the original application. Smith illustrated and described the recess *j* in the floor of the housing and the cut away portion *m* of the groove *g* on the inlet side. Claims 6, 7 and 8 confirm that it is the recess *j* in the floor of the housing—being extended laterally to communicate with the groove *g*—which cuts away the wall of the groove on the inlet side. The following are portions of claims 6, 7 and 8 which relate to the structure in quetsion:

Claim 6: "a recess in the floor of said housing on the inlet side of said gate, said recess extending laterally whereby *the walls of said guide grooves* of the gate *are cut away by the recess* on the inlet side," (Italics supplied)

Claim 7: "a recess in the floor of said housing on the inlet side of said gate, said recess gradually increasing in depth to said gate and extending laterally whereby the *walls of said guide grooves* of the gate *are cut away by the recess* on the inlet side." (Italics supplied)

Claim 8: Same as claim 7.

In his response to the first Office action, Smith entered additional claims 12-16, inclusive, claims 13 and 15 containing language describing the manner in which the lower walls of the gate grooves on the inlet side were cut away by the recess in the floor of the housing. These claims were declared to be allowable in substance. The language of the claims is as follows:

Claim 13: "a recess provided in the floor of said housing on the inlet side of said gate, said recess extending laterally, and *cutting away the lower walls of said gate grooves* on the inlet side," (Italics supplied)

Claim 15: "a recess provided in the floor of said housing in the inlet side of said gate, said recess extended laterally, and *cutting away the lower walls of said gate grooves* on the inlet side," (Italics supplied)

Claim 1 of the patent calls for grooves formed in the side walls of said housing, the side walls of the inlet side being provided at the bottom with cavities connecting with said grooves, in which to receive the material scraped off by the gate while being closed. There is no

doubt that "the side walls of the inlet side" refers to the side walls of the grooves, because all during the prosecution of the application Smith repeatedly says the "*walls of said guide grooves* of the gate are cut away", and there is no indication that he changed the meaning of this term when he used it in claims 1 and 2 of the patent to describe the same structure.

In the Office action following the presentation of claims 12 to 16, claim 12 was declared to be allowable; claim 13 was rejected as indefinite, but the Examiner told Mr. Smith how to amend the claim to cure the indefiniteness, and stated that the claim would be considered allowable if the claim were so amended. Smith amended the claim as directed by the Examiner, but the claim was again rejected as indefinite because of the wording of the "whereby" clause. The Examiner did not reject the claim as unpatentable over any prior art. Claims 14, 15 and 16 were rejected as indefinite, but the Examiner told Mr. Smith how to amend these claims to cure the indefiniteness, and said that if so amended these claims would be considered allowable. Thus, it is established on the record that *the invention defined by these claims was patentable over any of the prior art.*

Scope of the patented claims.

The "cavities" in the side walls of the groove *g* on the inlet side, as defined by claims 1 and 2 of the patent, are one and the same thing as the recess *j* in the floor of the housing, being extended laterally to cut away the walls of the grooves on the inlet side and thus establish

communication with said grooves, as described in the specification and in the claims presented during prosecution of the application. This being true, then claims 1 and 2 of the patent are of broader scope than claims 12 and 13, presented in the amendment filed May 19, 1931.

In making a comparison of claims 1 and 2 of the patent with claims 1 and 2 of the application as originally filed, and claims 12 and 13, presented with the amendment filed May 19, 1931, it will be helpful to consider the *function of the apparatus defined by each claim*. It will be noted that there is some difference in the structure defined by the several claims—that is, some of the claims call for certain elements which are omitted by other claims. The reason for the omission of some elements from certain claims is that the omitted elements are not necessary to perform the functions pointed to by the several claims. For example:

The function of the structure defined by claims 1 and 2 of the patent is to clear the guide grooves of accumulated pulp. The elements necessary to perform this function are recited by these claims as a gate slidable between inlet and outlet ports in grooves formed in the side walls of the housing, the side walls of the inlet side [of the grooves] being provided at the bottom with cavities connecting the said grooves to facilitate removal of material from the grooves by the gates while being closed. Claim 2 differs from claim 1 only in that it provides that the floor of the inlet side of the housing inclines downwardly toward the cutting edge of the gate when in closed position.

The function of the structure defined by *original claims 1 and 2* is to scrape away the material adhering to the valve housing adjacent the outlet port—and there is no doubt that Smith had in mind the face *c'* of the housing part *c*. Note that the groove is not mentioned in either of these claims, and that, additionally, each claim recites that the gate is beveled on the inlet side at its lower edge in order the better to scrape the surface *c'*. The intended function of the structure defined by claims 1 and 2 of the application as filed is described on page 1, column 2, lines 41-49, where it is said:

> "By this construction, any pulp stock or other material which may collect on the face *c'* of the housing part *c* is scraped off by the gate *h* into the recess *j*, hence is prevented from being compressed or otherwise adhering to the valve housing, or interfering with the operation of the valve. When the gate is again opened, the material so collected in the recess will be carried away by the flow of material through the gate valve."

The function of claims *1 and 2 of the patent* is told on page 2, column 1, lines 16-23. This structure *includes the groove g*, the fact that the wall of the groove on the inlet side is cut away as at *m* down to the inclined bottom surface *j* so that stock that has accumulated *in the groove* is scraped off by the edge of the gate and discharged into the bottom surface or floor of the housing, to be carried away with the next flow of material through the valve. In these claims, therefore, the groove is a necessary element, as is likewise the recitation of the fact that the wall of the groove on the inlet side is cut away—"provided with cavities"—at the bottom in order that the groove may be relieved of the material

scraped off by the gate while being closed. The claim says to "receive" the material scraped off by the gate, but it is clear that the intended function is as described in lines 19 et seq. on page 2, column 1 of the patent:

> "thus any stock that has accumulated in said grooves is scraped off by the edge of the gate and discharged onto the bottom surface or floor of the housing and carried away with the next flow of material through the gate valve."

Claim 12 calls for a gate slidable in grooves formed in the side walls of the housing, *the gate being beveled on the inlet side* at its lower end to form a knife edge. The remaining element of the claim is defined as a recess provided in the floor of the housing in the inlet side of the gate, whereby material dislodged into said recess by the operation of the gate will be scoured away by the flow of material therethrough. While this structure could be interpreted broadly enough to point to the function of clearing accumulated stock from both the groove and the face *c'* of the housing part *c*, there is no doubt that claim 13 does contemplate both of these functions, and so it is believed that claim 12 points only to the function of clearing the face *c'* of the housing part *c*.

Claim 13 includes as an element, "a recess provided in the floor of said housing in the inlet side of said gate, said recess being extended laterally and the lower walls of said gate groove being cut away." Because the claim recites that the lower end of the gate is beveled to form a knife edge, and also that the recess is extended laterally to cut away the wall of the groove on the inlet side

"whereby material dislodged into said recess by the operation of the gate will be scoured away by the flow of material therethrough", it is believed that claim 13 points to the *dual function of clearing both the groove and the face c' of the housing part c.*

With these considerations in mind, it will readily be seen that claims 1 and 2 of the patent are not readily comparable with those claims of the application which were intended to point to a different function; and there is no doubt, also, that these claims are of broader scope than the claims presented during prosecution of the application which were intended to perform the *same* function. It should be remembered that claim 12 was declared to be allowable, and claim 13 to be allowable in substance, in the Office action of October 29, 1931.

At no time during the prosecution of the application for the patent in suit was any requirement made by the Examiner that Smith limit his structure to one having an outlet port of any particular shape. It is interesting to note that not only did Smith refrain from putting any such limitation in more than one-half of the claims pending during prosecution of the application, but the limitation as to shape of the outlet port does not appear in the first two claims of the patent in suit. The V-shaped opening in plaintiffs' valve is the preferred form of opening in a valve embodying the principles of the Smith construction, but a round or oval opening is clearly an equivalent thereof, and to so hold does not enlarge plaintiffs' claims. At no time did the Examiner indicate allowance or rejection of a claim merely be-

cause of Smith's inclusion therein of the limitation that the outlet port is or is not V-shaped.

The shape of the opening through the transverse wall is immaterial. In claim 3, therefore, the recitation that the lower end of the opening through the transverse wall is V-shaped is surplusage. This particular limitation could have been omitted from the claim without in any wise affecting patentability of the claim or its validity. Mr. Smith's testimony regarding this feature is as follows:

> "Q. Your first valves were with a round opening?
> A. Correct, and as I said to you a moment ago, the first valve after 20 years is still functioning.
> Q. Now is it true that whether it be a round opening or a V-shaped opening that the valves function the same?
> A. They appear to; they appear to." (Trans. p. 78)

The Smith invention embodies a transverse wall-gate-groove structure. Smith's gate is made to *slide against the transverse wall* by grooves formed in the side walls of the housing.

> "By this construction, any pulp stock or other material which may collect on the face *c'* of the housing part *c* is scraped off by the gate into the recess *j* hence is prevented from being compressed or otherwise adhering to the valve housing, or interfering with the operation of the valve." (Col. 2, lines 41-46, Smith patent)

Strange as it may seem, *the prior art does not show an instance where the gate is made to slide against the face of the valve seat to effect a scraping action to keep the valve seat clean.* See, for example, Glass, whose gate is

loosely mounted and is pressed against its seat *after* it is moved into the annular groove in the valve housing. Other patents of record in this case showing gates which are moved *obliquely into seating position* and which do not scrape the face of the seat are Belfield 105,027; Allt 233,180; Lunken 494,579; Lunkenheimer 494,581 and 494.582; Patterson 985.444; Snow 1,179,047; and Barker 1,751,122. It is well known, of course, that a wedge-shape gate, such as shown by Gill or Hewes, does not contact its seat during opening and closing movements. Atcheson's sled runners E tend to move the gate F′ obliquely into seating engagement with the seat H′.

Another advantage produced by the invention developed by Smith is found in the fact that a transverse wall or a valve seat for the gate supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed.

The prior art definitely proves that it was unknown prior to the Smith patent to provide *gate* valves for installation in such a manner that fluid pressure would tend to *force the gate toward the seat*. On cross-examination, defendant's counsel tried to get Mr. Smith to say that "There are many types of valves in which there is no wall at or on the inlet side of the gate", but Mr. Smith reminded defendant's counsel that such valves were not *gate* valves, and defendant's counsel then admitted that he was speaking of valves generally. Mr. Smith reminded him that such valves were flap valves, disc valves, check valves, and many others wherein the construction is quite different from that of a gate valve.

A further novel feature found in the combination of elements defined by Smith's claims is attested to by the fact that before the introduction of the Smith valve, valves used in pulp mills were characterized by structures in which the grooves for the gates extended around the circle of the valve housing or across the floor of the valve. Illustrative patents are Glass 109,001; Hewes 127,768; Allt 233,180; Lunken 494,579; Lunkenheimer 494,581 and 494,582; Snow 1,179,047; and Barker 1,751,-122. Of this type of structure the Smith patent says (col. 1, lines 24-32):

> "Further, in a gate valve of this class, the pulp stock or other material tends to collect in the guide-ways or grooves of the gate and cause the latter to bind and makes it very difficult to operate. This is aggravated by the fact that pulp, if permitted to dry, forms a hard glue-like substance from which the gate may only be broken away by taking the valve housing apart."

Smith purposely avoided a structure wherein a groove extends around the complete circle of the valve housing, so that there would be no groove in the floor of the valve wherein material would tend to collect. Smith was not trying to avoid a cylindrical outlet opening, but rather to avoid a continuous groove around the full circle of the outlet opening, and the language of the Smith patent appearing in column 1, lines 16-24, must be so interpreted. The shape of the opening is immaterial. Smith believes, however, that a V-shaped opening is more efficient than a cylindrical opening.

To provide a scouring action to remove the pulp in front of the transverse wall when the gate is opened,

Smith caused the lower portion of the wall on the inlet side of the groove to be cut away and so form a recess in the floor of the housing on the inlet side of the gate. When the gate is opened the material which has collected in the recess is carried away by the flow of material through the valve by reason of the turbulence created by the transverse wall.

Defendant's valves are provided with a transverse wall extending around the full circle of the valve housing, which transverse wall forms the outlet side of the groove in which the gate slides and which supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed. The wall of the groove on the inlet side is cut away across the floor of the valve housing so that any pulp stock which accumulates in the groove and which is shoved out of the groove by the descending gate and onto the floor of the housing will be carried away by the flow of material through the valve when the gate is opened. The elements of defendant's valve are identical with the elements of plaintiffs' valve—the principle difference being that defendant employs a welded construction while plaintiffs' valves are cast.

Defendant has appropriated all of the features of the Smith construction, and now seeks to avoid the liability for infringement by saying that the Smith patent is a very narrow one covering a very minor improvement in a highly developed art, and that the claims of the Smith patent are of such limited scope that they do not embrace the valves as manufactured by the defendant.

The Smith valve was readily accepted by a great and important industry, which still proclaims the Smith valve as the best of this type of equipment yet offered for its use. The claims are to be construed in the light of the real invention, and, while they cannot be given a construction broader than the actual teachings of the patent as shown by the drawings and specifications, there is no doubt but that the Smith patent taught Fabri-Valve Company of America how to construct the infringing device. As stated in 69 C.J.S., Sec. 204, page 677:

> "Claims, and the terms used therein, must be so construed, where possible, as to sustain, rather than invalidate, the patent and protect the real invention, and must be so construed where possible, under the circumstances, to preserve the substance of the patent, and should be liberally construed so as to uphold, and not destroy, the rights of the inventor in the substance of his invention. Courts should be careful to avoid such construction of the claims as will defeat the real discovery which the inventor is contributing to the art."

Respectfully submitted,

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No. 14,428

United States Court of Appeals

For the Ninth Circuit

JOSEPH A. ELLIOTT,

Appellant,

vs.

PACIFIC FAR EAST LINES, INC., a corporation, Claimant of S. S. "Canada Bear", etc.,

Appellee and Cross-Appellant.

OPENING BRIEF OF CROSS-APPELLANT.

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Title 46, U.S.C., Section 597 (R.S. Section 4530).....3, 16, 18, 23

Title 46, U.S.C., Section 641 (R.S. Section 4549) 16

Title 46, U.S.C., Section 713 (R.S. Section 4612)..... 15

Constitutions

United States Constitution, Article III, Sections 1 and 2.... 1

No. 14,428

United States Court of Appeals
For the Ninth Circuit

JOSEPH A. ELLIOTT,
Appellant,

vs.

PACIFIC FAR EAST LINES, INC., a corporation, Claimant of S. S. "Canada Bear", etc.,
Appellee and Cross-Appellant.

OPENING BRIEF OF CROSS-APPELLANT.

JURISDICTION.

The suit is one for wages claimed to be due the libellant (cross-appellee here) and for double wages on the theory that the libellant was discharged at Yokohama, Japan and was not paid within the time required by statute. Thus it is clear that it is a case of admiralty and maritime jurisdiction. As such the District Court of the United States was vested with original jurisdiction. (U. S. Constitution, Article III, Sections 1 and 2.) The final decree was entered in the Court below on April 12, 1954. (Tr. Vol. 1, p. 33.) Libellant's notice of appeal was filed May 6, 1954

(Tr. Vol. 1, p. 36) and claimant's notice of appeal was filed June 29, 1954 (Tr. Vol. 1, p. 49). Therefore, pursuant to the provisions of Title 28 U.S.C. Sections 1281 and 2107, this Honorable Court is vested with appellate jurisdiction.

STATEMENT OF THE CASE.

In the first cause of action of the first amended libel *in rem,* the libellant alleged that, on or about May 8, 1952, he signed regular shipping articles at San Francisco, California, for a voyage on the S. S. "Canada Bear" "not exceeding 12 calendar months, and back to the continental United States". He alleged that his wages were fixed at $275.00 per month and that they were increased to the sum of $286.00 per month; and that on the 18th day of June, 1952, "libellant fell ill while the said S. S. 'Canada Bear' was at Yokohama, Japan, and was taken to a hospital for treatment, and was required to remain in said hospital until his vessel had sailed from Yokohama, and by reason thereof, libellant was repatriated to the United States direct from Yokohama, Japan, and did not join his vessel". He also alleged that from May 8, 1952, to and including the 18th day of June, 1952, he earned as wiper on the said vessel the sum of $579.24; that during his employment he drew upon his wages the approximate sum of $200.00; and that there was a balance of earned wages due him of $379.24 as of June 18, 1952. (Tr. Vol. 1, pp. 3-4.)

In the second cause of action, first amended libel, it is alleged, by way of conclusion, "that pursuant to Title 46, Section 596, U. S. Code, and Title 46, Section 597, U. S. Code, libelant became entitled to all of his wages at the time he left the S. S. 'Canada Bear' on June 18, 1952."

In substance, all that the second cause of action alleges as ultimate facts is that on June 18, 1952, libellant *fell ill* while the vessel was at Yokohama, Japan; that he was taken to a hosiptal for treatment and was required to remain in the hospital until the vessel had sailed from Yokohama; that the balance of his earned wages at said time was the sum of $379.24; that none of his wages were left at Yokohama, Japan; that on June 18, 1952, prior to the sailing of the vessel he advised the agent of the S. S. "Canada Bear" that he was in the hospital; that the master of the vessel was advised prior to his sailing that libellant was in the hospital; and that notwithstanding said knowledge the master refused, failed and neglected to pay to the libellant or to leave with the agent of the S. S. "Canada Bear" at Yokohama, Japan, or with the United States Consul at said place, the wages due libellant for his services on the S. S. "Canada Bear". (Tr. Vol. 1, pp. 4-5.)

Claimant's (cross-appellant) answer denied the allegations with reference to the length of the voyage and as to the amount of monthly wages, and alleged that the wage rate provided for in the shipping articles was the sum of $262.99, at the time they were executed, and later (as of May 15, 1952) increased to

the rate of $274.79 per month. (Tr. Vol. 1, p. 9.) Claimant also denied that the libellant fell ill while the S. S. "Canada Bear" was at Yokohama or that by reason of any illness the libellant was required to remain in any hospital or that he did not rejoin his vessel by reason of any illness; and alleged that the only reason for his failure to rejoin his vessel at Yokohama, Japan, was that he voluntarily became intoxicated and was unable by reason of his intoxication to rejoin his vessel or to perform his contract. Claimant also alleged that "on or about the 25th day of July, 1952, the libellant executed a mutual release as required by Revised Statutes of the United States 4552 wherein he agreed that there were no wages whatever due him and said mutual release is on file at the office of the United States Shipping Commissioner at San Francisco, California, and claimant denies that there is due to the libellant the sum of $379.24, or any other sum whatsoever or at all." (Tr. Vol. 1, pp. 10-11.)

The claimant also denied that by reason of any statute, or otherwise, libellant became entitled to wages in any sum whatsoever or at all at the time he left the S. S. "Canada Bear" on June 18, 1952; admitted that no wages were left at Yokohama, Japan; and denied that there was any duty or obligation to leave any wages at Yokohama, Japan. Claimant also denied that any demand was made upon respondent on July 25, 1952, for any wages due libellant or that any wages were due and admitted that no payment was made to libellant on July 25, 1952. It was also denied that the

master of the vessel was advised prior to sailing that libellant was in the hospital or that the master refused, failed and neglected to pay to the libellant the wages due libellant for his services on the vessel. (Tr. Vol. 1, pp. 12-13.)

The vessel arrived at Yokohama, Japan, on June 17, 1952. Libellant went ashore that night, returned to the vessel and went ashore again on June 18, 1952. (Tr. Vol. 11, pp. 7-8.) Prior to leaving the vessel and going ashore the last time he knew that it was going to sail the next day. He went to a moving-picture show and about 10 P.M. (June 18, 1952) he began to drink. Shortly before midnight he went from a drinking place into a taxicab to take him to where he could get a water taxi and did not know anything that happened after getting into the taxicab until he woke up in the hospital. (Tr. Vol. 11, p. 45.) When he woke up in the hospital on the morning of June 19, 1952 he called the agent for the Pacific Far East in Yokohama, told him who and where he was and was told by the agent that he knew libellant was "in there". The agent asked libellant what he wanted to do and libellant "asked him how about sending me some money" when he got a chance. The agent asked libellant how much and was told "$50.00" which the agent brought to libellant about a week later, stating that he had been so busy he wasn't able to get over there any sooner. (Tr. Vol. 11, pp. 8-10.)

Libellant was repatriated to the United States on the S. S. "China Bear" one of the ships of the Pacific Far East Steamship Company. When he got out of

the hospital on June 30, 1952, the S. S. "Canada Bear" was not in Yokohama. He got back to the United States at Alameda on July 25, 1952. He went to the office of the Pacific Far East Line in San Francisco on the same date. He went to the port purser's office to get his voucher, moneys that he figured were due him, the balance of the amount that was earned during the particular voyage. (Note: He did not tetsify that he said anything like the foregoing to whoever he talked to.) Whoever the gentleman was at the window at the port purser's office looked through the file of vouchers and when he pulled libellant's out, he said: "Mr. Elliott, this is a coincidence. You have $579 earnings and $579 deductions." (Tr. Vol. 11, pp. 11-12.) Up to this time libellant had not been "discharged".

The difference between the sum of $513.50 and $579.24 was what he had earned on coastwise articles prior to the time he signed the (foreign) articles at San Francisco. (Tr. Vol. 11, p. 12.)

After leaving (the purser's office) Pacific Far East Line on July 25, 1952, I contacted my union relative to this; just a routine appeal. I told "the union representative about the $254.04" and *"he was under the same conclusion I was, he figured the same, that I didn't have any coming to me any more than I thought.* I never knew I had any coming to me until I talked to Mr. (David A.) Fall." (Tr. Vol. 11, p. 44.)

While at the office of the Pacific Far East Line in San Francisco I did not receive any money on account

of my wages. I later went to the office of the Shipping Commissioner in San Francisco and did not receive at that place any money on account of my wages. I signed off the articles then, at San Francisco, on July 25, 1952. There was no way I know of to get my discharge from that vessel (S. S. "Canada Bear") without signing off. I signed off in the office of the United States Shipping Commissioner. You have to go before the United States Shipping Commissioner to sign a foreign voyage and you have to go before the United States Shipping Commissioner to get your discharge. (Tr. Vol. 11, pp. 15-16.)

> "Q. Did you at any time later contact the Pacific Far East Line with reference to the wages?
>
> A. The only time Pacific Far East was contacted again was through you, I think, Mr. Fall." (Tr. Vol. 11, p. 17.)

The contact through Mr. Fall was by letter dated April 23, 1953. (Tr. Vol. 11, p. 52; Libellant's Exhibit 1.) This letter does not state the amount which was claimed as the balance of earned wages.

The record is in a sloppy status with reference to the details of the amount of the expenditures or obligations which were incurred by the claimant over and above the total amount of the cash advances made to the libellant and the deductions which were conceded to be proper, but it was stipulated that the sum of $254.04 was deducted on account of hospital bills and other expenses "due to Mr. Elliott's misconduct". (Tr. Vol. 11, p. 27 and pp. 29-30.) It was also stipu-

lated by libellant's proctor that "it was possible, when this voyage was completed and before the seaman signed off, for the boat to have sued him for the amount of the hospital bill." (Tr. Vol. 11, p. 39.)

Claimant's Exhibit "C", a page of the vessel's log-book, shows that the master of the vessel made an entry stating that libellant deserted the vessel at Yokohama, Japan, on June 19, 1952. The Shipping Articles, Claimant's Exhibit "B" show that the voyage ended at San Francisco, California, on June 29, 1952. At that time, line 37, referring to Joseph A. Elliott, stated that he had deserted the vessel at Yokohama, Japan, on June 18, 1952. The word "deserted" was circled and the words "Charge cancelled —see log book" inserted, presumably by the Deputy United States Shipping Commissioner at a later date and not in the presence of the master of the vessel because his initials do not appear in approval of the alteration. Probably this was done at the same time as the sentence "Charge of desertion cancelled by Pac. Far East Lines as seaman was in hospital—see attached. R. A. F. (?) 7/17/52" was written at the bottom of the page upon which the charge of desertion had been entered by the master of the vessel.

Claimant's Exhibit "B" (the Shipping Articles) shows that all of the members of the crew who were on board the vessel at the end of the voyage and had complied with their respective contracts were paid off in the presence of the master and a deputy United States Shipping Commissioner at San Francisco, California, on June 29, 1952 (at which time the libellant

was still in Yokohama, Japan, in a hospital). Twenty-six days later, on July 25, 1952, libellant signed off the articles in the presence of a deputy United States Shipping Commissioner at San Francisco, California, and at said time the articles (line 37) contained the notation "no wages due". (Tr. Vol. 11, p. 38.) This was regarded by the libellant and the deputy United States Shipping Commissioner as the mutual release required by the provisions of Revised Statutes, Section 4552. A certificate of mutual release dated July 25, 1952, directed to Pacific Far East Line, San Francisco, Calif., signed by R. D. Edwards, deputy shipping commissioner *and by Joseph A. Elliott,* stating that there were no wages due, was produced by claimant at the trial and introduced in evidence as Claimant's Exhibit "A". (Tr. Vol. 11, p. 37.)

During the trial of the action it was stipulated that libellant signed on at $262.99 per month; that this monthly wage was increased to $274.79 as of May 15, 1952; that he actually earned wages in the sum of $513.50 between May 8, 1952 and June 18, 1952; that he was advanced the sum of $105.00; that he had "slops" of $16.86; that state unemployment benefits at 1 per cent ($5.77) were taken out; that social security benefits were in the sum of $8.65; and that withholding tax in the sum of $88.20 was taken out. (Tr. Vol. 11, pp. 3-4.) At the start of the trial libellant's proctor stated that there was an issue as to the right of the claimant (cross-appellant) to deduct fines in the sum of $34.98, in that "the libelant claims there were no fines and the respondent claims that they were en-

titled to under federal statute, 46 U.S.C. 701." (Tr. Vol. 11, pp. 4-5.) As the trial proceeded and libellant admitted that the amount of his log fines would probably amount to $34.98, his proctor agreed that the "$34.98 should be added to the other items he (libellant) was charged with". (Tr. Vol. 11, p. 14.) With this concession, made by libellant during the course of the trial, it was then agreed that (subject to an existing mutual release signed by libellant at the office of the United States Shipping Commissioner on July 25, 1952) the balance of wages earned was $254.04. (Tr. Vol. 11, pp. 25-28.)

It may be necessary to refer to other evidence in its brief in reply to appellant's opening brief (not yet served or filed) but for the purposes of its cross-appeal claimant believes the foregoing statement of the case is sufficient.

SUMMARY OF ARGUMENT.

1. The second cause of action in the first amended libel does not allege facts sufficient to state a cause of action for the recovery of the penalty provided for by the Revised Statutes of the United States, section 4529.

2a. The District Court erred in failing to make a finding responsive to the allegation, fourth article (denied in the answer) that the libellant "*fell ill* while the said S. S. 'Canada Bear' was at Yokohama, Japan."

2b. The District Court erred in failing to find that the libellant did not at any time make any demand upon the master of the vessel for one-half part of the balance of his wages earned and remaining unpaid while the vessel S. S. "Canada Bear" was at Yokohama, Japan, in the month of June, 1952.

2c. The District Court erred in failing to find that the libellant was not discharged while the vessel was at Yokohama, Japan, in the month of June, 1952.

2d. The District Court erred in finding that the libellant on July 25, 1952, made a demand upon the Port Purser for claimant Pacific Far East Lines at San Francisco, California, for the wages due to libellant as a member of the crew of the S. S. "Canada Bear" to and including the 19th day of June, 1952.

2e. The District Court erred in failing to find that when the voyage ended at San Francisco on June 29, 1952 (inadvertently referred to as July 17, 1952 in assignment of error number V) and all of the members of the crew who had completed the voyage were paid off and discharged in the presence of a United States Shipping Commissioner that it was impossible for the master of the vessel to pay off and discharge the libellant at the end of the voyage in San Francisco for the reason that the libellant was not, on said date, at any time in the presence of the said master.

2f. The District Court erred in failing to make any finding with reference to the date when the cargo of the vessel had been discharged or the date upon which the libellant was discharged, if in fact he has ever been discharged.

2g. The District Court erred in failing to find that when the libellant left the vessel on June 18, 1952, he knew that it was sailing the next day.

2h. The District Court erred in failing to find that when the agent of claimant was contacted by libellant on June 19, 1952, when libellant was in the hospital, the libellant asked the agent to send him $50.00 when he got a chance and that the agent did so approximately one week later.

2i. The District Court erred in failing to find that claimant has expended for and on account of medical and hospital care required by the libellant during the voyage, and resulting from his own misconduct, a sum in excess of $254.04.

2j. The District Court erred in failing to find that the failure of the libellant to return to the vessel prior to the time it sailed from Yokohama on June 19, 1952, was without the knowledge or consent of the master of the vessel.

2k. The District Court erred in failing to find that it is not true that the master of the S. S. "Canada Bear" was advised prior to the sailing of the vessel that the libellant was in a hospital.

2l. The District Court erred in failing to find that the libellant did not at any time demand from the master of the vessel any part or portion of the balance of his wages earned and remaining unpaid between the time the vessel arrived at Yokohama, Japan, up to and including the time the vessel sailed from Yokohama, Japan.

The portions of the summary of argument 2a to 2m are taken from the claimant's assignments of error. (Tr. Vol. 1, pp. 43-47.)

ARGUMENT.

At the outset claimant desires to state that it would not have taken an appeal from the final decree if the findings prepared by the libellant fully disposed of the issues raised by the pleadings and the factual issues which should have been presented by proper allegations on the part of the libellant in order to present an issue within the provisions of the penalty wage statute involved in a case of this type. Uncertainty in the mind of claimant's proctor with reference to the right in the absence of a cross-appeal to attack the validity of certain findings and the failure to make others which seem to be pertinent and required resulted in filing of claimant's notice of appeal.

POINT 1.

THE SECOND CAUSE OF ACTION OF THE FIRST AMENDED LIBEL FAILS TO ALLEGE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION PURSUANT TO THE PROVISIONS OF REVISED STATUTES, SECTION 4529.

It is important to consider this proposition because an analysis of the statute upon which the libellant must rely will show what findings of fact should be made in a case of this kind.

The statute provides, in substance, that the master or owner of any vessel making foreign voyages shall pay to every seaman his wages "within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, *whichever first happens;* and in all cases the seaman shall be entitled to be paid *at the time of his discharge* on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment *in the manner hereinbefore mentioned without sufficient cause* shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods * * *" (Emphasis added.)

The provisions of R. S. Section 4511 (Title 46 U.S.C. 564) state that the shipping articles "shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter * * *". Pursuant to the form of shipping articles thus provided for by statute "the said crew agree to conduct themselves in an *orderly, faithful,* honest, and *sober* manner, and to be at all times diligent in their respective duties and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the vessel, and the stores and cargo thereof, *whether on board,* in boats, *or on shore;* and *in consideration of which service,* to be *duly performed,* the said master hereby agrees to pay the said crew, as wages, the sums against their names respectively expressed, and to supply them with provi-

sions according to the annexed scale. * * * And it is also agreed that if any member of the crew considers himself to be aggrieved by any breach of the agreement *or otherwise,* he *shall* represent the same to the *master* or officer in charge of the vessel, in a quiet and orderly manner, who shall *thereupon* take such steps as the case may require. * * *'' (Emphasis added; R. S. Section 4612 (Schedule, Table A, following Title 46 U.S.C. Section 713).)

The second cause of action of the first amended libel does not allege any of the following: 1. That the libellant duly or at all performed his obligations as set forth in the Shipping Articles which he executed. 2. That he considered himself aggrieved by a breach of the agreement *or otherwise* and represented the same to the master or officer in charge of the vessel or that said master or officer failed to take such steps as the case required. 3. The date when the cargo was discharged. 4. The date when or the fact that the libellant was discharged. 5. That there was a neglect or failure on the part of the master or owner, *without sufficient cause,* to pay him his wages within twenty-four hours after the cargo had been discharged or within four days after his discharge, *whichever first happened.*

The second cause of action, first amended libel, alleges that "demand was made upon respondent at San Francisco, California, on the 25th day of July, 1952 for wages due libelant, but payment was refused". (Tr. Vol. 1, p. 4.) He does *not* allege that at or prior to said alleged demand he had been discharged or that

this demand was made or that he presented himself for payment of any claimed wages within twenty-four hours after the cargo of the vessel had been discharged. Furthermore, R. S. Section 4549 (46 U.S.C. Section 641) provides, in substance, that all seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port *shall* be *discharged and receive their wages* in the *presence* of a *duly authorized shipping commissioner,* except in cases where some competent Court *otherwise* directs; and that "any master or owner of any such vessel who discharges any such seaman belonging thereto, or pays his wages within the United States in *any other manner,* shall be liable to a penalty of not more than $50.00." (Emphasis added.)

Therefore, the libellant could not have been "discharged" in the United States excepting in the presence of a duly authorized shipping commissioner and neither the master nor the owner could have lawfully paid him any wages within the United States excepting in the presence of a duly authorized shipping commissioner.

With reference to Revised Statutes of the United States, Section 4530 (Title 46 U.S.C. Section 597), there is no allegation of facts bringing the case within the provisions thereof. It provides, in substance, that "every seaman on a vessel of the United States shall be entitled to receive *on demand* from the *master* of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at

the time when such demand is made at every port where such vessel, *after the voyage has been commenced,* shall load or deliver cargo *before the voyage is ended,* * * * Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is *ended* every *such* seaman shall be entitled to *remainder* of the wages which shall then be due him, as provided in the preceding section: * * *'' (Emphasis added.)

There is no allegation that libellant made any demand whatever upon the *master* of the vessel for one-half part or any other part of wages earned and remaining unpaid while the vessel was at Yokohama, Japan, or that any such demand was not complied with. Therefore, he was not released from his contract and was not then entitled to full payment of wages earned.

It is apparent from the language "and when the voyage is *ended* every such seaman shall be entitled to the remainder of the wages which shall be *then* due him, as provided in the preceding (R. S. Section 4529, Title 46 U.S.C. Section 596) section" that R.S. Section 4529 was intended to govern the payment of wages of the members of the crew who have fully performed their contractual obligations as set forth in the shipping articles and are members of the crew "when the voyage is *ended*" and perhaps those who are released from their contracts by a failure of the master to comply with a lawful demand for partial payment of wages at some port where the vessel, after the voyage

has been commenced, shall load or deliver cargo *before* the voyage is *ended.*

The opaque allegation that libellant "fell ill" while the vessel was at Yokohama, Japan, did not impose any legal obligation upon the master of the vessel to then and there pay him the balance of his earned wages even if he had faithfully performed his contractual obligations up to that time.

Section 4530, Revised Statutes of the United States, does not state that if a proper and timely demand for a one-half part of earned and unpaid wages is made upon the master of a vessel that a failure of the master to comply with such demand shall constitute a *discharge* of the seaman within the meaning of the penalty provisions of Section 4529. All it states is that the seaman shall, under such circumstances, be released from *his* contract and shall be then and there entitled to full payment of his earned and unpaid wages. This section of the Revised Statutes says absolutely nothing about any penalty of two days' wages for each day of delay in paying such seaman his full earned and unpaid wages. It may be that the Court would construe a release of the seaman from his contract, if the master of a vessel failed to comply with a lawful demand of a seaman for a one-half part of his earned and unpaid wages, as a discharge within the meaning of Section 4529; but that question is not presented by the allegations of the first amended libel. There is no language in either Section 4529 or 4530 which provides that there shall be a penalty imposed

upon either the master or owner of a vessel in the event a seaman becomes ill while the vessel is in a domestic or foreign port or for that reason fails to return from shore leave and complete the voyage.

It is therefore respectfully submitted that the second cause of action in the first amended libel does not allege facts sufficient to constitute a cause of action for the penalty provided for in Section 4529.

POINT 2.

THE DISTRICT COURT ERRED IN MAKING AND IN FAILING TO MAKE FINDINGS OF FACT WITH REFERENCE TO ISSUES RAISED BY THE PLEADINGS AND THE LAW.

At the time libellant's deposition was taken he testified that, other than on the particular voyage involved here, he had been hospitalized for alcoholism probably more than a half dozen times. (Tr. Vol. 11, p. 22.) This, considered in connection with his testimony (supra) that he got into a taxicab after having some drinks in Yokohama, Japan, passed out and remembered nothing until he woke up in a hosiptal the next morning, is substantial evidence in support of an inference that his "illness" was actually intoxication to the extent of practical oblivion. If there is added to this the fact that libellant's proctor stipulated that the hospital expenses were the result of libellant's *misconduct* the conclusion is obvious that the libellant did not conduct himself in a sober manner as he agreed to

do in the shipping articles. He made no demand upon the master for any money while the vessel was at Yokohama, Japan. The only request he made for money was complied with by the agent of claimant. When he got back to San Francisco and went to claimant's office he made no *demand*. His testimony that he went to the port purser's office to get his voucher, "moneys I figured was due me, the balance of the amount that was earned during the particular voyage" is not a recital of anything he claims he said at the time. It is merely a recapitulation of *his* unexpressed intentions. He did not testify that he made any objection to the statement that he had $579.00 earnings and $579.00 deductions. He then went to his union and it was there concluded that he had no wages coming to him. He next went to the office of the United States Shipping Commissioner where it was apparently agreed between libellant and the deputy shipping commissioner that he had no wages coming. He signed off the articles and executed a mutual release and a certificate of mutual release on July 25, 1952.

Unless what happened at the office of the shipping commissioner on July 25, 1952 constituted a discharge of the libellant he has not been discharged at all. The act of signing off was not the result of any fraud, misrepresentation or duress on the part of the claimant. It was done voluntarily, apparently with the advice of libellant's union and a public official, and the claimant was entitled to rely upon libellant's agreement that he was not entitled to any wages until the mutual release was set aside, for good cause shown, by a Court

of competent jurisdiction. When David A. Fall, Esq., made the written demand for an unspecified amount in April 1953 the mutual release was still extant.

The libellant received a valuable consideration for the execution of the mutual release in that he was relieved of the obligation to reimburse the claimant for the expenses incurred as the sole result of his admitted misconduct. He at no time attempted to rescind the mutual release. It was not a void contract.

Under the foregoing circumstances claimant contends that no Court should hold that there was a neglect or failure on the part of the master or owner, without sufficient cause, to pay libellant his wages within twenty-four hours after the cargo had been discharged or within four days after libellant had been discharged. It was impossible for the master to have paid the wages within the time specified if the cargo was discharged at the end of the voyage and before the rest of the crew were paid off because the libellant was not present at that time.

At least during the period of four days after libellant signed off the articles on July 25, 1952 (if this constituted a discharge), he and the claimant entertained the opinion that he was not entitled to any wages. There was certainly no arbitrary or willful neglect or failure to pay earned and unpaid wages during this period. The law requires that wages of a seaman be paid in cash. Libellant did not present himself at any place of business of the claimant during the four day period after he signed off the articles so that he could have been paid. The reason for this

failure is that all parties concerned were of the honest belief that libellant had nothing coming to him.

It is also clear from the record that the actual net amount of earned and unpaid wages was not ascertained or agreed upon until the time of the trial. At the start of the trial the item of fines in the sum of $34.98 was disputed by the libellant. There is no evidence showing that the libellant would have agreed to this deduction at any time before it was resolved in claimant's favor by stipulation during the trial. Libellant alleged in his pleading that the balance due was the sum of $379.24. It was conceded at the trial that this was not the correct amount and that there was no obligation on the part of master or owner of the vessel to have paid said amount.

POINT 3.

AN APPEAL IN A CASE OF ADMIRALTY AND MARITIME JURISDICTION IS A TRIAL DE NOVO AND THIS HONORABLE COURT HAS THE POWER TO CORRECT THE FINDINGS OF FACT WHERE THERE IS NO CONFLICT IN THE EVIDENCE.

The proposition that the United States Court of Appeals has the power to revise and amend findings of fact on a trial *de novo* is so well established that citation of authority seems to be unnecessary.

Cross-appellant is not seeking a reversal of the final decree but does respectfully request that this Honorable Court exercise its discretion to the end that the issues of fact raised by the pleadings and the provi-

sions of Sections 4529 and 4530, Revised Statutes of the United States, will be definitely determined and thus put an end to this litigation.

The burden of proof by a preponderance of substantial evidence rested upon the libellant and for that reason every allegation of fact in second cause of action, first amended libel, which is denied in the answer should be found to be untrue in each instance where the libellant offered no evidence in support of such allegation. There is no evidence to support the allegations that libellant "fell ill" in Yokohama, Japan, or that for that reason he failed to return to the vessel. The plain fact is that he voluntarily breached his written agreement to conduct himself in an orderly and sober manner and consumed enough intoxicating liquor to cause his complete "blackout".

In the interest of brevity, claimant and cross-appellant will not repeat the details in which it requests a revision and amendment of the findings of fact as outlined in the summary of argument, supra, but respectfully requests that this Honorable Court revise and amend the findings in accordance therewith or in such other manner as seems just and equitable under the circumstances shown by the record.

CONCLUSION.

The record shows no ground for the impostition of any penalty upon the claimant. It is therefore respectfully contended that the findings of fact be amended and revised and that the final decree be affirmed.

Dated, Los Angeles, California,
August 11, 1954.

Respectfully submitted,
LASHER B. GALLAGHER,
Proctor for Claimant and Cross-Appellant.

No. 14428.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH A. ELLIOTT,

Appellant-Libelant,

vs.

PACIFIC FAR EAST LINES, INC., a corporation, Claimant of S. S. "CANADA BEAR," etc.,

Appellee-Claimant.

APPELLEE-CLAIMANT'S REPLY BRIEF.

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No. 14428.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH A. ELLIOTT,

Appellant-Libelant,

vs.

PACIFIC FAR EAST LINES, INC., a corporation, Claimant of S. S. "CANADA BEAR," etc.,

Appellee-Claimant.

APPELLEE-CLAIMANT'S REPLY BRIEF.

Statement of Pleadings and Facts.

On May 8, 1952, Appellant-libelant signed shipping articles at San Francisco, California, for a voyage to one or more ports in the far east and back to a final Pacific Coast port of discharge in the United States, for a term of time not exceeding nine calendar months. [Claimant's Ex. "B."] Pursuant to these shipping articles, the master of the vessel, in consideration of Mr. Elliott's *specific* agreement to *conduct* himself in an *orderly, faithful,* honest *and sober* manner, agreed to pay him wages in the sum of $262.99 per *month.* This *monthly* wage rate was raised to $274.79 as of May 15, 1952. On June 18, 1952 the Appellant went ashore at Yokohama, Japan,

knowing that the vessel was scheduled to sail the next day. He went to a moving-picture show and about 10 P. M., June 18, 1952, he began to drink. Shortly before midnight he went from a drinking place into a taxicab to take him to where he could get a water taxi and did not know anything that happened after getting into the taxicab until he woke up the next morning in the hospital. [Tr. Vol. II, pp. 7-8, p. 45.] When Mr. Elliott woke up in the hospital he telephoned to a person designated by *him,* in his testimony at the trial, as the "agent for the Pacific Far East in Yokohama," and told him who he was and where he was and the "agent" told Mr. Elliott that he knew Mr. Elliott "was in there." [Tr. Vol. II, p. 8.] "The agent particularly asked me what I did want to do, and I asked him how about sending me some money when he gets a chance. He asked me how much. I told him $50.00." He said "I will bring it to you." He brought it to me approximately one week later and he told me "that he had been so busy, that is the reason he wasn't able to get over there any sooner." The $50.00 was in Japanese yen. Mr. Elliott signed a receipt for it. [Tr. Vol. II, pp. 9-10.] He received no other money while he was in Japan. [Tr. Vol. II, p. 10.]

Archibald Cook, the master of the vessel, was of the opinion on June 19, 1952, that Mr. Elliott had deserted the vessel at Yokohama, Japan. He demonstrated that conclusion by making an entry in the official log, as follows: "1600. June 19, 1952. Yokohama, Japan. Joseph Elliott, Wiper, deserted vessel at this port." [Claimant's Ex. "C."] According to the shipping articles [Claimant's Ex. "B"] the voyage ended at San Francisco, California, on June 29, 1952. These shipping articles demonstrate that as of June 29, 1952, the master of the vessel was still of the

opinion that Mr. Elliott had deserted the vessel. Line 37 of these shipping articles contains the entry that Joseph A. Elliott had deserted the vessel at Yokohama, Japan, on June 18, 1952. On *July 17,* 1952, some person other than Archibald Cook, the master of the vessel who had made the entry on the official log with reference to Mr. Elliott's desertion, made a notation on the official log, as follows: "Charge of desertion cancelled by Pac. Far East Lines as seaman was in hospital—see attached. R. A. F. 7/17/52." The entry on line 37 of the shipping articles (*supra*) was also altered by some person other than Archibald Cook and it is obvious that the alteration was made on or after July 17, 1952. The word "deserted" is circled and the words "Charge cancelled—see Log-Book" were hand-printed above the circled word "deserted."

On June 30, 1952, one day after the end of the voyage, Mr. Elliott "got out of the hospital." [Tr. Vol. II, p. 11.] Presumably, therefore, Mr. Elliott was in a hospital somewhere in Japan on June 29, 1952. The date when he left Japan does not appear anywhere in the record. What he did or where he was between June 30, 1952 and the date he left Japan does not appear in the record, but when he got out of the hospital on June 30, 1952, the "Canada Bear" was not in Yokohama. [Tr. Vol. II, p. 10.] He was repatriated back to the United States on the "China Bear" one of the ships of the Pacific Far East Lines (Appellee-claimant), arriving at Alameda, California, on July 25, 1952. [Tr. Vol. II, pp. 10-11.]

Predicated upon the foregoing facts with reference to what happened in Japan the Appellant contends, and the Appellee disputes, that he was *discharged* within the meaning of the word "discharged" as it is used in Section 4529,

Revised Statutes of the United States; Title 46, United States Code, Section 596, "at Yokohama, Japan." (App. Op. Br. p. 1, lines 22-24.)

What happened after Appellant got back to the United States on July 25, 1952 is as follows: I went to the office of the Pacific Far East Line in San Francisco on July 25, 1952. "I went to the port purser's office to get my voucher, moneys that I figured was due me, the balance of the amount that was earned during the particular voyage. Whoever the purser was, whoever the gentleman was at the window at the port purser's office, looked through the file of vouchers, and when he pulled mine out, he said, 'Mr. Elliott, this is a coincidence. You have $579 earnings and $579 deductions.'" [Tr. Vol. II, pp. 11-12.] While at the office of Pacific Far East Line in San Francisco I received no money on account of my wages. I later went to the office of the Shipping Commissioner in San Francisco and at that place I received no money on account of my wages. I signed off the articles on July 25, 1952, in the office of the United States Shipping Commissioner. [Tr. Vol. II, pp. 15-16.] At the time he signed off the shipping articles, the notation "no wages due" was on line 37. At the same time, July 25, 1952, Appellant signed a Certificate of Mutual Release addressed to Pacific Far East Line in which it was stated that there were "no wages due." [Claimant's Ex. "A"; Tr. Vol. II, pp. 36-38.]

Before going to the office of the United States Shipping Commissioner the Appellant contacted his Union.

> "Q. Mr. Elliott, didn't you, after leaving Pacific Far East Line on July 25, 1952, contact your union relative to this? A. Just a routine appeal.
>
> The Court: But you did talk about it?

The Witness: Yes, sir.

The Court: Did you tell the union representative about the $254.04?

The Witness: Yes, sir, and he was under the same conclusion I was, he figured the same, that I didn't have any coming to me any more than I thought . . ." [Tr. Vol. II, p. 44.]

"Q. Did you go back to the Pacific Far East Line office in San Francisco at any time within the four days after you were discharged on July 25, 1952, and make any demand for wages?

* * * * * * * *

The Witness: No." [Tr. Vol. II, pp. 45-46.]

"Q. Did you at any time later contact the Pacific Far East Line with reference to the wages? A. The only time Pacific Far East was contacted again was through you, I think, Mr. Fall." [Tr. Vol. II, p. 17.]

The contact referred to was a letter dated April 23, 1953 [Libellant's Ex. 1] written by Mr. Fall to Pacific Far East Line, Inc., 141 Battery Street, San Francisco 11, California. The letter, in part, reads as follows:

"It appears that Elliott was hospitalized in Yokohama, Japan about June 18, 1952. However, the Captain of the 'Canada Bear' did not leave his wages for him at that Port, nor has he ever been paid the same. He had drawn about $200.00 and has never received a statement of this item. Demand is hereby made upon you for the balance of his wages, *together with penalty wages of two days for one for each day after June 18, 1952.* You have failed to give him a statement of the overtime due to him, but have given him a form W-2, indicating his wages to be $579.24.

"I have been instructed to institute an action for the recovery of *wages and penalty* if a settlement cannot be made in the immediate future." (Emphasis added.)

Appellant's first amended libel *in rem* was filed on June 17, 1953. [Tr. Vol. I, pp. 2-8.] It is as follows:

"The libel of Joseph A. Elliott, late a seaman aboard the S. S. 'Canada Bear' in an action *in rem* against the S. S. 'Canada Bear,' for wages, civil and maritime, respectfully shows:

First: That at all times herein mentioned the S. S. 'Canada Bear' was and is an American Vessel, and will be during the pendency of process herein, within the jurisdiction of this Honorable Court.

Second: That the libelant is a seaman within the designation of persons permitted to sue herein without furnishing bond for, or prepayment of, or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 1916, U. S. C. A.

Third: That on or about the 8th day of May, 1952, at San Francisco, California, the libelant signed regular Shipping Articles for a voyage on the S. S. 'Canada Bear' not exceeding 12 calendar months, and back to the continental United States. That on said 8th day of May 1952, libelant entered into his duties as a member of said crew in the capacity of a Wiper, at wages or salary of $275.00 per month, which were increased to the sum of $286.00 per month.

Fourth: That on the 18th day of June, 1952, libelant fell ill while the said S. S. 'Canada Bear' was at Yokohama, Japan, and was taken to a hospital for treatment, and was required to remain in said hospital until his vessel had sailed from Yokohama,

and by reason thereof, libelant was repatriated to the United States direct from Yokohama, Japan, and did not join his vessel.

Fifth: That from the 8th day of May, to and including the 18th day of June, 1952, libelant earned as Wiper on the said S. S. 'Canada Bear,' the sum of $579.24. That libelant drew upon his wages during his employment, the approximate sum of $200.00, but libelant has not been rendered a statement of account, nor has he received any portion of the sum of $379.24, balance of wages earned by him from respondent upon to the date of May 18, 1952.

Sixth: All and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

For a Second and Distinct Cause of Action Libelant Alleges:

Seventh: Libelant incorporates herein by reference Articles First, Second, Third, Fourth, Fifth, Sixth of his First Cause of Action as if fully set forth herein.

Eighth: That pursuant to Title 46, Section 596, U. S. Code, and Title 46, Section 597, U. S. Code, libelant became entitled to all of his wages at the time he left the S. S. 'Canada Bear' on June 18, 1952. That none of libelant's wages were left at Yokohama, Japan.

Ninth: That demand was made upon respondent at San Francisco, California, on the 25th day of July, 1952 for wages due libelant, but payment was refused.

Tenth: That on the 18th day of June, 1952, prior to the sailing of the S. S. 'Canada Bear' from Yokohama, Japan, libelant advised the agent of the S. S. 'Canada Bear' that libelant was in the hospital. That said agent advised libelant that he—the agent, would

notify the Master of the S. S. 'Canada Bear' as to the libelant's whereabouts, prior to the sailing of said vessel. That libelant is informed and believes, and therefore alleges, that the Master of the S. S. 'Canada Bear' was advised prior to his sailing that libelant was in the hospital. That notwithstanding the said knowledge upon the part of the Master of the S. S. 'Canada Bear,' the said Master refused, failed and neglected to pay to the libelant herein, or to leave with the agent of the S. S. 'Canada Bear' at Yokohama, Japan, or to leave with the United States Consul at Yokohama, Japan, the wages due libelant for his services on the S. S. 'Canada Bear.'" [Tr. Vol. I, pp. 2-5.]

On June 26, 1953, Appellee-claimant filed its answer to the first amended libel. In so far as it is pertinent to the appeal being prosecuted by the Appellant-libelant said answer reads as follows:

"I.

Admits the allegations in the First Article.

II.

Admits the allegations in the Second Article.

III.

Admits that on the 8th day of May, 1952, at San Francisco, California, the libelant signed regular Shipping Articles for a voyage on the S. S. 'Canada Bear' for a period not exceeding nine months and denies that said Articles provided for a voyage not exceeding twelve calendar months. Denies that on said 8th day of May, 1952, libelant entered into his duties at wages or salary of $275.00 per month or that said wages were increased to the sum of $286.00 per month and alleges that the wage rate provided in said Articles was at the rate of $262.99 per month

and that said wage rate was increased as of May 15, 1952, to the rate of $274.79 per month. . . .

IV.

Denies that on the 18th day of June, 1952, the libelant fell ill while the S. S. 'Canada Bear' was at Yokohama and claimant is informed and believes and upon said ground alleges that while the vessel was at Yokohama on June 18th and June 19th, 1952, the libelant wilfully and wrongfully consumed intoxicating liquor to such an extent that he was at 5:45 A. M. on June 19, 1952, so far under the influence of intoxicating liquor that he was picked up by Military Police and taken to the 8168th U. S. Army Hospital at Yokohama, Japan, and was hospitalized there with a diagnosis of chronic alcoholism and released therefrom on June 30, 1952. . . . Claimant denies that by reason of any illness the libelant was required to remain in any hospital until his vessel had sailed from Yokohama, or that by reason of any illness the libelant was repatriated to the United States direct from Yokohama, Japan, or did not rejoin his vessel by reason of any illness and alleges that the only reason for the libelant's failure to rejoin his vessel at Yokohama, Japan, was that the libelant voluntarily became intoxicated and was unable by reason of his intoxication to rejoin his vessel or to perform his contract.

V.

Denies that from the 8th day of May, to and including the 18th of June, 1952, the libelant earned as wiper, or otherwise, on the S. S. 'Canada Bear,' the sum of $579.24 and alleges in this respect that libelant was not, from the time he boarded said vessel up until June 18, 1952, at all times in a condition which would enable him to earn his wages and that the total

wages in accordance with the contract of employment which would have been due if the libelant had performed the said contract, was the sum of $576.50. Claimant further alleges that on or about the 25th day of July, 1952, the libelant executed a mutual release as required by Revised Statutes of the United States 4552 wherein he agreed that there were no wages whatever due him and said mutual release is on file at the office of the United States Shipping Commissioner at San Francisco, California, and claimant denies that there is due to the libelant the sum of $379.24, or any other sum whatsoever or at all.

VI.

Denies that all or singular the premises are or that any thereof is true excepting as hereinabove specifically admitted and admits that the premises are within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

VII.

Claimant incorporates herein by reference thereto its answer to the First, Second, Third, Fourth, Fifth and Sixth Articles of the first cause of action as if fully set forth herein.

VIII.

Denies that by reason of any statute, or otherwise, libelant became entitled to wages in any sum whatsoever or at all at the time he left the S. S. 'Canada Bear' on June 18, 1952. Admits that no wages were left at Yokohama, Japan, but denies that there was any duty or obligation to leave any wages at Yokohama, Japan.

IX.

Denies that any demand was made upon respondent on the 25th day of July, 1952, for any wages due libelant and denies that any wages were due

libelant and admits that no payment was made to libelant on said 25th day of July, 1952.

X.

Claimant has no information or belief upon the subject sufficient to enable it to answer the allegations in the Tenth Article and placing its denial thereof upon said ground, denies said allegations and each thereof." [Tr. Vol. I, pp. 9-13.]

In addition to the testimony and documentary evidence referred to hereinabove, the record shows as follows:

During the trial of the action it was stipulated that libelant signed on at $262.99 per month; that this monthly wage was increased to $274.79 as of May 15, 1952; that he actually earned wages in the sum of $513.50 between May 8, 1952 and June 18, 1952; that he was advanced the sum of $105.00; that he had "slops" of $16.86; that state unemployment benefits at 1 per cent ($5.77) were taken out; that social security benefits were in the sum of $8.65; and that withholding tax in the sum of $88.20 was taken out. [Tr. Vol. II, pp. 3-4.] At the start of the trial libelant's proctor stated that there was an issue as to the right of the claimant (cross-appellant) to deduct fines in the sum of $34.98, in that "the libelant claims there were no fines and the respondent claims that they were entitled to under federal statute, 46 U. S. C. 701." [Tr. Vol. II, pp. 4-5.] As the trial proceeded and libelant admitted that the amount of his log fines would probably amount to $34.98, his proctor agreed that the "$34.98 should be added to the other items

he (libelant) was charged with." [Tr. Vol. II, p. 14.] With this concession, made by libelant during the course of the trial, it was then agreed that subject to an existing mutual release signed by libelant at the office of the United States Shipping Commissioner on July 25, 1952, the balance of wages earned was $254.04. [Tr. Vol. II, pp. 25-28.]

The record is in a sloppy status with reference to the details of the amount of the expenditures or obligations which were incurred by the claimant over and above the total amount of the cash advances made to the libelant and the deductions which were conceded, *after the trial of the case commenced,* to be proper, but it was stipulated that the sum of $254.04 was deducted on account of hospital bills and other expenses "due to Mr. Elliott's misconduct." [Tr. Vol. II, p. 27 and pp. 29-30.] It was also stipulated by libelant's proctor that "it was possible, when this voyage was completed and before the seaman signed off, for the boat to have sued him for the amount of the hospital bill." [Tr. Vol. II, p. 39.]

At no time during the trial did the Appellant contend, excepting by an attempt to introduce a purported "Certificate of Discharge," that he had been discharged in Japan. To the contrary, he testified as follows:

> "Q. Is there any way you could get your discharge from that vessel without signing off? A. None that I know of." [Tr. Vol. II, p. 15.]
>
> "The Witness: . . . You have to go before the United States Shipping Commissioner to sign a

foreign voyage or a coastal voyage, and you have to go before the United States Shipping Commissioner to get your discharge." [Tr. Vol. II, p. 16.]

"The Court: At the end of the voyage the seaman signs off, if I understand it correctly, and if I haven't got it correctly, you can correct me, and when the seaman signs with a boat, the boat has some hold on that seaman until he is released; isn't that correct?

Mr. Fall: That is correct.

The Court: In other words, he cannot get a job with another boat until he gets a release from the boat he has signed with.

Mr. Fall: He is bound to that vessel.

The Court: The only way he can get unbound is to sign a release or sign off at the end of the voyage.

Mr. Fall: That's right.

The Court: So really and truly, now, the boat owner, can we put it this way, has a right to his services until the boat owner releases him to other employment?

Mr. Fall: Yes. He is bound to the vessel until he signs off." [Tr. Vol. II, p. 40.]

"The Court: You mean this certificate, then, was signed in San Francisco after the seaman had come back to the United States?

Mr. Fall: Yes. That was the only place he could possibly have obtained it other than from the United States Consul in Japan." [Tr. Vol. II, p. 76.]

The "certificate" mentioned immediately hereinabove by Judge Westover is a purported "Certificate of Discharge." [Libelant's Ex. 2 for Ident.] Appellant's proc-

tor tried to introduce the purported "Certificate of Discharge" because the Deputy United States Shipping Commissioner who prepared it inserted *his* conclusion that the Appellant had been discharged on June 18, 1952, at Yokohama, Japan. Appellee-claimant objected to the offer of the document in evidence on each of the following grounds, severally:

> "One, the figures and language '18 June 1952' following the printed words 'Date of Discharge' are and each thereof is a conclusion and opinion of whoever typed the figures and words on this piece of paper. Two, the document is not competent as proof of any fact in issue in this case. Three, there is no evidence proving or tending to prove that the master of the vessel had anything whatsoever to do with this so-called certificate of discharge, and the document on its face purports to have a typewritten signature, and there is no evidence proving or tending to prove that the master was even present or had anything whatsoever to do with the preparation of this certificate or any part of portion thereof." [Tr. Vol. II, p. 75.]

The objection was sustained. [Tr. Vol. II, p. 80.]

The Mutual Release which was executed by the libelant in the presence of a Deputy United States Shipping Commissioner at San Francisco, California on July 25, 1952, was in full force and effect from the time of its execution up to the time the trial judge set the same aside in the findings of fact, conclusions of law and final decree, signed, docketed and entered on April 12, 1954. In this respect, the record shows the following:

"The court finds that the release executed by the libelant was not made by him with a full understanding of his rights, and that there was no consideration whatsoever for the same." [Tr. Vol. I, p. 28, lines 7-10.]

"1. That the release executed by the parties is set aside for good cause shown; . . ." [Tr. Vol. I, p. 29, lines 10-11.]

Statement of the Case.

1. The basic question involved on this appeal is whether or not the Appellant-libelant has pleaded or proved a case entitling him to penalty-wages in accordance with the provisions of Section 4529, Revised Statutes of the United States.

2. Appellee-claimant contends that the sole and exclusive possible bases of a right of a seaman to collect penalty wages must be shown to exist within the provisions of Section 4529, Revised Statutes of the United States, and that the Appellant-libelant has neither pleaded nor proved facts bringing his claim for the penalty wages within the provisions of said Statute.

3. The Appellant-libelant totally disregarded, in his amended libel, the requirement that "the libel shall also propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article" (Gen. Adm. Rule 22).

The representation to the court that Section 596, Title 46, United States Code, reads as quoted by Appellant-libelant (Op. Br. pp. 10-11) is, to say the least, misleading. The vessel involved was one making a foreign voyage and therefore the portion of the Statute which is deemed necessary to the decision of the case and which should have been printed accurately, reads as follows:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; . . ." (Revised Statutes of the United States, Sec. 4529, as amended, 38 Stat. at L. 1164.)

Appellant-libelant has failed to print either at length or otherwise the provisions of Section 4530, Revised Stat-

utes of the United States, as amended and in effect in the months of June and July of 1952. This statute, reads as follows:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided* such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 4529 of the Revised Statutes; *Provided further,* That notwithstanding any release signed by any seaman under section 4552 of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such a release and take such action as justice shall require. . . ." (41 U. S. Stat. at L. 1006.)

ARGUMENT OF THE CASE.

POINT I.

Appellant-libelant Has Failed to Prove by Evidence, Oral or Documentary, That He Is Entitled to the Recovery of Penalty or Double Wages.

In the course of the voyage from San Francisco, California, to one or more ports in the Far East and back to a final Pacific Coast Port of discharge in the United States, for a term of time not exceeding nine calendar months [Shipping Articles, Claimant's Ex. "B"] the vessel "Canada Bear" arrived at the port of Yokohama, Japan, on June 17, 1952. (Statement of pleadings and facts, *supra.*)

There is no evidence whatever in the record with reference to the following elements:

1. That the vessel loaded or delivered cargo at Yokohama, Japan.
2. That while the vessel was at Yokohama, Japan, the Appellant-libelant demanded from the master of the vessel one-half part of the balance of his wages earned and remaining unpaid.
3. That there was any failure on the part of the master to comply with any such demand.
4. That he was discharged in a foreign port by a consular officer.

The statute with reference to the right of a seaman "to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo

before the voyage is ended" also provides as follows: "Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned." (Sec. 4530, Revised Statutes, 41 U. S. Stat. at L. 1006.)

There is no evidence whatever in the record which will support a finding that the Appellant-libelant was released from his contract or entitled to full payment of wages earned pursuant to the provisions, or any thereof, set forth in said Section 4530.

Section 4530, Revised Statutes, also indicates that even in cases where there has been a failure on the part of the master to comply with a demand for one-half part of the balance of wages earned and remaining unpaid at the time when such demand is made at a port where the vessel shall load or deliver cargo before the voyage is ended does not amount to a "discharge" even though the seaman is released "from *his* contract." Immediately after the sentence which provides for the release of the seaman from his contract by reason of a failure on the part of the master to comply with a demand for one-half part of the balance of wages the section proceeds as follows:

> "And when the voyage is *ended* every *such* seaman shall be entitled to the remainder of the wages which shall be then due him"

as provided in Section 4529, Revised Statutes.

It is important to notice the proposition that Section 4530, Revised Statutes, does not provide that a failure on the part of the master to comply with a demand made in accordance therewith shall release the master or the owner of the vessel from his or its contract as set forth in the Shipping Articles. Said Section 4530 does not

provide that the release of the seaman from his contract entitles the master of the vessel to discharge the seaman or acts, *ipso facto,* as a discharge of the seaman.

There are also other statutes of the United States which seem to be obviously pertinent to a logical determination of the manner in which an American seaman may be discharged from an American merchant vessel in a foreign port. These statutes are Sections 4573, 4574, 4576, 4580 and 4581, Revised Statutes of the United States.

Section 4573, Revised Statutes, reads as follows:

> "Before a clearance is granted to any vessel bound on a foreign voyage . . ., the master thereof shall deliver to the collector of the customs a list containing the names, places of birth and residences, and description of the persons who compose his ship's company; to which list the oath of the captain shall be annexed, that the list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them; and the collector shall deliver him a certified copy thereof."

Section 4574, Revised Statutes, provides, in part, as follows:

> "In all cases of private vessels of the United States sailing from a port in the United States to a foreign port, the list of the crew shall be examined by the collector for the district from which the vessel shall clear, and if approved by him, shall be certified accordingly. No person shall be admitted or employed on board of any such vessel unless his name shall have been entered in the list of the crew, approved and certified by the collector for the district from which the vessel shall clear."

Section 4576, Revised Statutes, provides, in part, as follows:

> "The master of every vessel bound on a foreign voyage . . . shall exhibit the certified copy of the list of the crew to the first boarding officer at the first port in the United States at which he shall arrive on his return, and also produce the persons named therein to the boarding officer, whose duty it shall be to examine the men with such list and to report the same to the collector; . . . For each failure to produce any person on the certified copy of the list of the crew the master and owner shall be severally liable to a penalty of $400, . . .; but such penalty shall not be incurred on account of the master not producing to the first boarding officer any of the persons contained in the list who may have been discharged in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal, to be produced to the collector with the other persons composing the crew, nor on account of any such person dying or absconding or being forcibly impressed into other service of which satisfactory proof shall also be exhibited to the collector."

It thus appears, without the slightest question, that unless the master of the S. S. "Canada Bear" was able to show, in the absence of producing Joseph A. Elliott to the first boarding officer at the first port in the United States at which he arrived on his return from Yokohama, Japan, that Mr. Elliott had "been discharged in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal" at the time he produced to the collector the other persons composing the crew, or was able to exhibit satisfactory proof to the collector that Mr. Elliott had

died or absconded or had been forcibly impressed into other service, then the master and the owner of the vessel would have been subject to a penalty of $400.00.

If the only type of discharge of a seaman in a foreign country which will excuse the master of a vessel from the duty of producing Mr. Elliott to the first boarding officer at the first port in the United States at which the master arrived on his return was a discharge in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal, then it seems to follow that no seaman may be discharged in a foreign port excepting in accordance with the provisions of Sections 4580 and 4581, Revised Statutes.

Section 4580 is as follows:

> "Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge, if it appears to such officer that said seaman has completed his shipping agreement, or is entitled to his discharge under any Act of Congress or according to the general principles or usages of maritime law as recognized in the United States, such officer shall discharge said seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman; but no payment of extra wages shall be required by any consular officer upon such discharge except as provided in this Act."

Section 4581 is, in part, as follows:

> "If any consular officer, when discharging any seaman, shall neglect to require the payment of and collect the arrears of wages and extra wages required to be paid in the case of the discharge of any seaman,

> he shall be accountable to the United States for the full amount thereof. The master shall provide any seaman so discharged with employment on a vessel agreed to by the seaman, or shall provide him with one month's extra wages, if it shall be shown to the satisfaction of the consul that such seaman was not discharged for neglect of duty, incompetency, or injury incurred on the vessel. If the seaman is discharged by voluntary consent before the consul, he shall be entitled to his wages up to the time of his discharge, but not for any further period. If the seaman is discharged on account of injury or illness, incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the fund for the maintenance and transportation of destitute American seamen."

The foregoing statutes considered together clearly indicate that there is only one method by which a seaman may be discharged in a foreign port and that even the *mutual* consent of the master and the seaman is not sufficient to constitute a discharge. It is more obvious that neither the seaman nor the master can, by unilateral action, accomplish a discharge in a foreign port. Even where there is a voluntary consent by both of them it must be communicated to the consular officer and such discharge must be "before the consul."

Appellee-claimant contends that the true meaning of the words "the seaman has been *discharged,*" as they are used in Section 4529, Revised Statutes, cannot be ascertained without giving careful consideration and effect to the provisions of Sections 4573, 4574, 4576, 4580 and 4581 of the Revised Statutes, particularly when a seaman claims that he was discharged in a foreign port during the course of a voyage from San Francisco, California,

to one or more ports in the Far East and back to a final Pacific Coast port of discharge in the United States, for a term of time not exceeding nine calendar months.

Even if the provisions of said Section 4580 are considered by themselves it seems clear that no American seaman can be discharged excepting by the governmental officer referred to therein and only upon satisfactory proof that at least one of the disjunctive conditions therein set forth actually exists.

Appellee-claimant contends that the legal maxim *inclusio unius est exclusio alterius* is applicable.

> "As exceptions in a statute strengthen the force of the law in cases not excepted, so enumerations weaken it in cases not enumerated. Indeed, it is a general principle of interpretation that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius.* The rule applies even though there are no negative words excluding the things not mentioned. Thus, a statute that directs a thing to be done in a particular manner, or by certain persons or entities, ordinarily implies that it shall not be done in any other manner, or by other persons or entities . . ."
>
> 50 Am. Jur., pp. 238-240, Sec. 244.

At the time involved in an opinion of the Supreme Court, Section 2329 of the Revised Statutes, read, in part, as follows:

> " 'The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommenda-

tion of the Attorney General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue . . . with his reasons therefor, with a statement of the amount of tax assessed, . . . and the amount actually paid in accordance with the terms of the compromise.' "

Although this section of the Revised Statutes has nothing whatever to do with the discharge of a seaman, what the Supreme Court said about its proper construction is quite important. Appellee-claimant contends that the rule of construction stated by the Supreme Court with reference to the particular statute involved is also applicable to a proper construction of the provisions of Section 4580, Revised Statutes.

"Sec. 3229 authorizes the Commissioner of Internal Revenue to compromise tax claims before suit, with the advice and consent of the Secretary of the Treasury, and requires that an opinion of the solicitor of internal revenue setting forth the compromise be filed in the Commissioner's office. Here the attempted settlement was made by subordinate officials in the Bureau of Internal Revenue. And although it may have been ratified by the Commissioner in making the additional assessment based thereon, it does not appear that it was assented to by the Secretary, or that the opinion of the solicitor was filed in the Commissioner's office.

"We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of

> public concern, it should be attested in the files of the Commissioner's office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the Bureau. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."
>
> *Botony Worsted Mills v. United States,* 278 U. S. 282, 288-289, 73 L. Ed. 379, 385.

The shipping articles provide, in effect, that Appellant-libelant was to be and remain a member of the crew from the port of San Francisco, California, to foreign ports and back to a port in the United States. These articles likewise obligated the master of the vessel to bring Mr. Elliott back to the United States unless he was lawfully discharged in a foreign port or died or absconded.

The provisions of the Revised Statutes, Sections 4573, 4574 and 4576, made it the statutory duty of the master of the vessel to bring Mr. Elliott back to the United States unless he had been "discharged in a foreign country *with the consent of the consul or vice consul there residing, certified in writing, under his hand and seal"* or he had died or absconded.

Section 4580, Revised Statutes, prohibits a consular officer from discharging a seaman in a foreign port unless it is made to appear by satisfactory evidence "that said seaman has completed his shipping agreement, or is entitled to his discharge under any Act of Congress or according to the general principles or usages of maritime law as recognized in the United States" and such officer cannot discharge a seaman unless he requires from the *master* of the vessel *"before* such discharge shall be made,

payment of the wages which may then be due said seaman; . . ."

There is no evidence whatever in the record indicating that the master of the "Canada Bear" made any application to a consular officer in Japan to discharge the Appellant-libelant or that the Appellant-libelant made any application to a consular officer for his own discharge. There is no evidence whatever in the record showing that any consular officer did discharge the Appellant-libelant.

Furthermore, neither the master nor Appellant-libelant *could* have made it appear to any consular officer that Appellant-libelant had completed his shipping agreement or was entitled to his discharge under any act of Congress or according to the general principles or usages of maritime law as recognized in the United States.

Section 4596, Revised Statutes (30 Stat. at L. 760; 38 Stat. at L. 1166; 53 Stat. at L. 1147), reads, in part as follows:

> "Whenever any seaman who has been lawfully engaged . . . commits any of the following offenses, he shall be punished as follows:
>
> "First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.
>
> "Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amounting to de-

sertion, by forfeiture from his wages of not more than two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute."

There is nothing in the second subdivision of said Section 4596, Revised Statutes, which provides that in the event a seaman commits any of the offenses set forth therein he would be entitled to a discharge upon application to a consular officer pursuant to Section 4580, Revised Statutes. Said second subdivision does not provide that the commission of the offenses therein set forth would entitle the master of the vessel to discharge the seaman in a foreign port.

It is held in a leading case that Sections 4529 and 4530, Revised Statutes, must be read and construed together.

> "Section 4529, so far as it affects this case, provides that the master or owner of any vessel shall pay to every seaman his full wages 'in case of vessels making foreign voyages, within 24 hours after the cargo has been discharged.' The Cubadist had made a foreign voyage and had discharged her cargo at Mobile, and the situation created by the Seamen's Act, if literally construed, had arisen. The appellants contend for a literal construction. The appellees contend that, construing the act in its entirety, it is evident that the words of section 4529, 'within 24 hours after the cargo has been discharged,' refer to a discharge of cargo upon the completion of the voyage for which the seaman shipped. This was the holding of the District Judge, and we concur in it.
>
> "Section 4529 and section 4530 should be construed together. The former provides for the payment of full wages to seamen; the latter, for half then earned

wages at any port, touched by the ship, where cargo is received or discharged. The former applies to full payment on completion of the voyage, or the termination of the shipping articles, or the discharge of the seaman; the latter to partial payments to be made during the progress of the voyage. Section 4530 provides for the payment of half then earned wages 'at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo *before the voyage is ended.*' During the progress of the voyage, full wages can only be demanded if half then earned wages are wrongfully denied. The section then reads as follows:

" 'And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, *as provided in section 4529 of the Revised Statutes.*'

"It is clear from this reference to section 4529 that Congress intended that section to cover only the payment of full wages due, on the completion of the voyage or discharge of the seaman, and section 4930 to cover all payments to be made during the progress of the voyage. The use of the words, in case of foreign voyages, 'after the cargo has been discharged,' instead of 'when the voyage is ended,' may be attributed to their former use in the Revised Statutes, when a necessity for retaining seamen, not only until completion of the voyage, but until after discharge of cargo, existed. However this may be, reading sections 4529 and 4530 together, they form a complete system only if we attribute to section 4529 the function of regulation of final payments in full upon completion of the voyage or discharge of the seaman, and to section 4530 the regulation of payments arising out of situations that occur during the progress of and before the time for final settlement between the

seaman and the shipowner, either because of the ending of the voyage for which he shipped or the discharge of the seaman, if that first occurred.

"To bring the two sections into harmonious relation with each other, it is necessary to give to the words 'after the cargo has been discharged' the meaning of a discharge upon the completion of the voyage for which the seaman shipped. There might be many complete discharges of cargo during the progress of a single voyage. In such cases, section 4530 and section 4529 would both apply, if section 4529 be given the construction contended for by appellants, and it would then come into direct conflict with section 4530. Section 4530 would entitle the seaman to only half of his wages then earned, while section 4529, if applicable to such a situation, would entitle him to full wages, even though he had not then been discharged. It will not be presumed that Congress intended to confer on seamen the right to demand, at their option, half-earned wages, or full wages, in identical situations. If section 4529 is limited to payments to be made upon completion of the voyage shipped for, and discharge of cargo thereupon, or to the discharge of the seaman, if that first occurs, there will be no such conflict between the two sections, and each will have its proper scope."

The Cubadist, 256 Fed. 203, 205-206.

A petition for a writ of certiorari filed in the Supreme Court by the seaman-libelant in *The Cubadist,* was denied on May 5, 1919. (249 U. S. 618, 63 L. Ed. 804.)

The shipping articles, Appellee-claimant's Exhibit "B" shows that all of the members of the crew who were aboard the "Canada Bear" and who had completed the agreement that they had made when they signed the

shipping articles were paid off, signed mutual releases, and were discharged in the presence of the master of the vesesl and a Deputy United States Shipping Commissioner in San Francisco, California, on June 29, 1952. The date, whether on June 29, 1952, or some date previous thereto, when the ship actually arrived at San Francisco, California, and the voyage thus ended, is not shown in the record.

Section 4549, Revised Statutes, provides, in part, as follows:

> "All seaman discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port, . . . shall be discharged and receive their wages in the presence of a duly authorized shipping commissioner, . . . except in cases where some competent court otherwise directs; and any master or owner of any such vessel who discharges any such seaman belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than $50."

If the Appellant-libelant was discharged within the meaning of Section 4529, Revised Statutes, at the time he signed off the articles in the office of the Coast Guard official acting as Deputy United States Shipping Commissioner in San Francisco, California, on July 25, 1952, it would have been an unlawful act, prohibited by Section 4549, Revised Statutes of the United States, for Appellee-claimant to have paid him any wages *before* such discharge. Pursuant to the provisions of Section 4549, Revised Statutes, Appellee-claimant could not have lawfully paid to the Appellant-libelant any wages which may have

been actually due at the time Appellant-libelant appeared at the port purser's office in San Francisco on July 25, 1952. This visit was prior to the time he went to the office of the United States Shipping Commissioner and signed off the articles. If he had not agreed in writing that he had no wages coming to him when he signed off the articles in the presence of a Deputy United States Shipping Commissioner then there might have been an obligation on the part of the Appellee-claimant to pay him whatever wages were actually due within four days after such discharge in accordance with the provisions of the Shipping Articles; and a compliance with the law, under such assumed but not existing facts, would have required the payment of such wages in the presence of a duly authorized Shipping Commissioner.

> "In its opinion before reargument the District Court, notwithstanding its conclusion that the master had sufficient cause for his failure to pay wages, ruled that the petitioner was entitled to recover double pay for the number of days which had intervened after the suit was brought. Petitioner argues here that, as there was no excuse for delay in payment after the suit was brought, the duty to pay double wages accrued from *that* date. But the liability is *conditioned* by the statute upon the refusal or neglect to pay wages *'in the manner hereinbefore mentioned, without sufficient cause.'* The quoted phrase refers to the *specified* periods *within which* the seaman's wages are directed to be paid, and the section thus imposes the liability for neglect, without sufficient cause, to pay the wages *within the prescribed period.* Petitioner seeks, by a more liberal interpretation of the words, to impose the liability for such delay in payment, without sufficient cause, as may occur at *any*

time *after an excusable failure to pay within the prescribed period.* This possibility is *precluded* by the further provision of the section that double wages shall be paid for each day 'during which payment is delayed beyond the respective periods' within which the payment is to be made. Thus, liability for double wages accrues, if at all, from the end of the period within which payment should have been made. *It must be determined by the happening of an event within the period,* failure to pay wages without sufficient cause. The statute affords a definite and a reasonable procedure by which the seaman may establish his right to recover double pay where his wages are unreasonably withheld. But it affords no basis for recovery if, by his own conduct, he precludes compliance with it by the master or owner. He cannot afterward impose the liability by the mere expedient of bringing suit upon it." (Emphasis added.)

McCrea v. United States, 294 U. S. 23, 31-32, 79 L. Ed. 735, 741.

In spite of the testimony given by Appellant-libelant at the trial which demonstrates that he did not entertain the slightest belief that he had been discharged at Yokohama, Japan, and the concessions made by his proctor in colloquy with the trial judge wherein it was admitted that the only way the Appellant-libelant could have gotten a discharge in Japan was through a consular-officer, he claims in his opening brief that he was actually discharged in Japan.

"Section 4511, Revised Statutes, and amendments (section 8300, Compiled Statutes), and the form provided in the schedule annexed, and section 4530,

Revised Statutes, and its amendments (section 8322, Compiled Statutes), for the protection of seamen, relate to the voyage, and impose duties on the ship and the seamen for the voyage. Neither can renounce these duties during the voyage. These statutes on their face, and the judicial construction given them, leaves no doubt of these conclusions: (1) The master *cannot* discharge the crew, and the crew *cannot* demand wages in full, until the end of the voyage; (2) the end of the voyage is not a port of distress, but the port of destination; (3) seamen are bound to serve until the voyage ends in the port of destination, unless there has been a breach of the contract by the master as to the time of the voyage or in some other material particular; . . ." (Emphasis added.)

Hamilton v. United States, 268 Fed. 15, 17, Cert. den., 254 U. S. 645, 65 L. Ed 454.

The record shows without conflict that the master of the vessel did not consider that the appellant-libelant had been discharged at Yokohama, Japan. The master's view of the situation, as it appeared to him, was that Mr. Elliott had deserted the vessel at that port and he made an entry in the official log book to that effect. This opinion of the master continued up to and including the end of the voyage and the discharge of the members of the crew who remained with the vessel to the end of the voyage. The charge that Mr. Elliott had deserted the vessel was clearly set forth on the shipping articles as of June 29, 1952.

"The statutes governing shipping articles for seamen date back to a common source, an Act of 1872. 17 Stat. 266. . . . The word 'discharge' appears in many sections of the source statute and the context of several of those sections compels the conclusion that 'discharge' means the termination of the contractual obligations of a given set of articles. It is provided, for instance, that seamen 'shall be discharged *and* receive their wages in the presence of a duly authorized Coast Guard official.' The master or owner who pays wages 'in any other manner' is subject to a fine. 46 U. S. C. A., §641 (emphasis added). The statute thus contemplates 'discharge' and payment of wages to be simultaneous acts and there is no doubt that seamen are paid when they are signed off the articles. 'Discharge' and 'signing off' must therefore be synonymous terms."

Newton v. Gulf Oil Corp., 180 F. 2d 491, 493.

In the light of the statutes and the case law on the subject, Appellee-claimant believes that Norris, in "The Law of Seamen," Volume I, Section 387, correctly states the basic principle as follows:

"Among the conditions of the statute (section 596) which makes the penalty operative is the requirement that a 'discharge' must take place either automatically by the termination of the voyage, by process of law, or by the action of the master."

In *"The Dawn,"* Fed. Case. No. 3,665, at page 202, the Court, in referring to a discharge of a seaman under the statutes in effect at the time, stated as follows:

"A discharge imports, in the natural and ordinary meaning of the word, a voluntary act on the part of the master."

The Appellant-libelant has completely failed to prove, by a preponderance of evidence or otherwise, the following essential elements:

1. That he had duly performed *his* obligations as specified in the Shipping Articles.

2. That when he left the vessel at Yokohama, Japan, he did so with the consent of the master.

3. That if he had the consent of the master to go ashore, the date and time when his shore leave expired.

4. That at the time the master made the log-entry that Mr. Elliott had deserted the vessel at Yokohama, Japan, the said master was not, in the light of circumstances actually known to him, reasonably justified in doing so.

5. That at the time of the end of the voyage on June 29, 1952, the master was not still reasonably justified in representing to the Coast Guard official acting as deputy United States Shipping Commissioner that Mr. Elliott had deserted the vessel at Yokohama, Japan, on June 18, 1952.

6. That he was discharged at Yokohama, Japan, on June 18, 1952 or June 19, 1952, or at any other specified time while he remained in Japan.

7. That the master of the vessel consented to or condoned Mr. Elliott's breach of his written contractual obligation to conduct himself in an "*orderly, faithful,* honest *and sober* manner . . . whether on board, in boats, *or on shore.*"

8. That any act or omission on the part of the master of the vessel released Mr. Elliott from his contract at Yokohama, Japan.

9. Whether or not cargo was actually discharged at San Francisco, California, upon the arrival of the vessel at that port.

10. That the neglect of the owner to pay him any wages within four days after he signed off the shipping articles containing his written concession that no wages were due and cooperated in causing the Certificate of Mutual Release stating the same thing to be delivered to the Appellee-claimant was a refusal or neglect, *within said four day period,* to pay wages *without sufficient cause.*

With reference to subdivision (9), immediately hereinabove, it is the contention of Appellee-claimant that a seaman claiming the penalties imposed by Section 4529, revised statutes, must prove whether cargo was or was not discharged at the end of the voyage and that if the evidence shows that cargo was actually discharged that there was a refusal or neglect, without sufficient cause, to pay any wages that might be due *within twenty-four hours* of such discharge of *cargo,* or that the *seaman* was discharged *before* the discharge of *cargo.* It is the event which *first* happens after the end of the voyage which fixes the time and period within which the earned wages must be paid. In view of the requirement of the law that seamen discharged in the United States must be discharged and paid in the presence of a Coast Guard officer, it is obvious that Mr. Elliott could not lawfully have been paid his wages in *Japan* within twenty-four hours after cargo had been discharged, if in fact cargo was discharged at the end of the voyage.

If what occurred at the office of the Coast Guard official, acting as a Deputy United States Shipping Com-

missioner, at San Francisco, California, on July 25, 1952, does not constitute a discharge of Appellant-libelant as of July 25, 1952 (by reason of the action of the Trial Court in setting aside the mutual release), then Mr. Elliott has not been discharged yet. In this connection, however, all Judge Westover did affirmatively was to set aside the *release* executed pursuant to the provisions of Section 4552, Revised Statutes of the United States.

As codified the law provides as follows:

> "That notwithstanding any release signed by any seamen under Section 644 of this title, any Court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require; . . ." (Title 46, U. S. Code, Sec. 597.)

Keeping in mind the rule stated in the case of *Newton v. Gulf Oil Corp.*, 180 F. 2d 491, 493, that " 'discharge' and 'signing off' must therefore be synonymous terms" it should follow that Elliott's act in signing off the articles on July 25, 1952, constituted a "discharge" within the meaning of Section 596, Title 46, U. S. Code. The mutual release was not void. It was, on the other hand, a binding contract until such time as some court of competent jurisdiction set it aside, for good cause shown. During this interval the appellee-claimant had sufficient cause to refuse or neglect to pay Mr. Elliott any sum whatever or at all on account of wages.

The Appellant-libelant makes the fallacious claim in one of his briefs that the law imposed upon the Appellee-claimant the burden of proving that the mutual release which he signed was valid, in accordance with the rule of law announced by the Supreme Court in *Garrett v.*

Moore-McCormack Co., 317 U. S. 238, 87 L. Ed. 239. The decision of the Court in that case is not applicable to the law or facts in the case at bar. The mutual release involved here is contained in a printed form and if the type is small that is no fault of Appellee-claimant. It was formulated, organized and printed by an agency of the United States. Appellant-libelant has been a seaman for many years and it would be strange indeed if he had never read the statutory form of mutual release contained in any of the shipping articles he had signed. The execution of such mutual release is required by law whenever a seaman is actually discharged, at least within the United States. It is quite obvious from the provisions of Section 4530, Revised Statutes of the United States (41 Stat. 1006) that the seaman is conclusively bound by the mutual release referred to therein unless *he* can convince some court of competent jurisdiction that there is good cause shown for setting it aside. The statute does not say that the release may be set aside unless the shipowner proves facts showing that it should not be set aside. The burden of proof is clearly placed, by the language of the statute, upon the seaman who claims that the release should be set aside.

Appellant-libelant has referred to Section 4550, Revised Statutes, 46 U. S. C. 642, quite a few times but is quite evident that his proctor has not carefully read the statute. Addressing certain observations to the *claim* that Appellant-libelant was discharged when the vessel sailed from Yokohama, Japan, at 1600 hours on June 19th it is quite obvious that it would have been utterly impossible for the master of the vessel to have delivered to Mr. Elliott "a full and true" or *any* "account of his wages, and all deductions to be made therefrom on any account whatso-

ever" at a time "not less than forty-eight hours before paying off or discharging" the seaman, for the simple reason that the master of the vessel could not have known forty-eight hours before the vessel sailed from Yokohama, Japan, that the Appellant-libelant would not be on board as a member of the crew at sailing time. The master had *actual* knowledge of the latter fact immediately before the vessel sailed because the seaman was then absent from the vessel. Furthermore, this section seems to strongly indicate that the master of a vessel has no authority whatever to discharge a seaman in any foreign port unless the master has, "not less than forty-eight hours before . . . discharging any seaman, deliver(ed) to him . . . a full and true account of his wages, and all deductions to be made therefrom on any account whatsoever; . . ." Compliance with this section seems to be a condition precedent to any actual discharge of the seaman by affirmative action on the part of the master of a vessel.

The "agent" of Appellee-claimant at Yokohama, Japan, did not refuse or neglect, without reasonable cause, to pay to Appellee-libelant whatever earned and unpaid wages might actually have been due in accordance with the terms and conditions of the Shipping Articles. If, as Appellant-libelant contends in his Opening Brief, the knowledge of the "agent" with reference to the fact that this seaman was in a hospital was imputed instantly to the principal, then the principal knew that the "agent" had asked the seaman what *he* wanted to do and the seaman replied that all he wanted, in effect, was a payment of $50.00 on account of any wages that might then have been actually due and that the seaman got every last cent that he had asked for. The principal also knew, under this theory of constructive notice, that when the "agent" brought the

$50.00 to the seaman about a week later it was accepted; that a receipt was signed for it; and no suggestion was made by the seaman that he wanted any more at that time.

The Shipping Articles, Appellee-claimant's Exhibit "B," is in the form *required by statute.* (Revised Statutes, Sec. 4511; 29 Stat. at L. 691; 32 Stat. at L. 829; and 37 Stat. at L. 736.) "The form given in the table marked A" in the schedule annexed to Section 4612, Revised States (30 Stat. at L. 762, 764; 38 Stat. at L. 1168; 46 U. S. Code, Sec. 713) provides, in part, as follows:

> "And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service, to be duly performed, the said master hereby agrees to pay the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the annexed scale."

There is nothing in the Shipping Articles which were executed by the master of the vessel and the Appellant-libelant which provides that the latter was employed on a *daily* basis. He was employed on a *monthly* basis and the language of the contract clearly means that he was to be paid by the month and not otherwise. We will assume, for the sake of argument only, that he had duly performed his contract for the first month of the term of the employment consisting of a complete voyage to last not over nine months and that at the end of that first month he was entitled to wages for the full month. He

had not, however, duly performed his contract for the *second* month which began on June 8, 1952. In so far as the Shipping Articles are concerned there is nothing contained therein which provides that the master of the vessel with whom he was required by statute to make the contract agreed that any wage would be *earned or payable* excepting at the end of each month and this was conditioned upon the due performance of the seaman's written and statutorily required contract. During the second month from June 8, 1952, to and including July 7, 1952, the seaman would have earned, if he had duly performed his contract, the gross sum of $274.79. Therefore, if he had actually earned wages in the sum of $513.50 between May 8, 1952, and June 18, 1952, it was because of some contract or agreement outside of and collateral to the statutory shipping articles. He could not have earned the gross sum of $513.50 between May 8, 1952, and June 18, 1952, at the monthly wage rate as fixed by the Shipping Articles at the sum of $269.99 per month from May 8, 1952, to May 15, 1952, and thereafter at the monthly rate of $274.79.

Although it is not in the record, in all probability the difference between the Shipping Articles agreement as to the total wages agreed to be paid by the *master* and the amount opaquely stipulated to at the time of the trial can be accounted for on no premise excepting a collective bargaining agreement between the owner of the vessel and the union of which the Appellant-libelant was a member. It has not been held up to this time, so far as the

undersigned proctor is aware, in any case where such collateral agreement was *not* definitely included in the Shipping Articles by reference thereto or quoting therefrom, that a refusal or neglect to pay whatever amount may have been due *exclusively* by reason of the terms and conditions of such collateral agreement within four days after an actual discharge will subject the master or the owner to any penalty whatever.

It is respectfully contended that as the burden of proving every essential element of an actual right to recover the penalty sought by him rested upon the Appellant-libelant, he should have offered some affirmative evidence on this important subject.

It is respectfully submitted here that Sections 4511, 4512, 4521, 4523, 4527, 4529 and 4612 are in *pari materia* and must be construed together in order to ascertain what the Congress intended to include within the meaning of the word "wages" as used in Section 4529. It is also respectfully submitted that if this is done, the only reasonable conclusion to draw is that the Congress was legislating only with reference to the wages which are actually due in accordance with the statutory form of shipping articles. Certainly it cannot be contended that the *master of the vessel* was legally obligated to pay Mr. Elliott one cent which was not actually earned in accordance with the shipping articles. The statute seems to put the master and the owner in the same category in the event of a refusal or neglect, without reasonable cause, to pay wages in the manner required by said Section 4529, Revised Statutes.

> "When articles are signed by a crew for a voyage, all bargaining, individual or collective, is ended for the duration of the voyage. A contract is made, binding both owner and seaman, that is lawful, if the articles comply with the statutes, and should be lived up to scrupulously."
>
> *Rees v. United States,* 95 F. 2d 784, 792.

It is provided by statute that the shipping articles *shall* contain "Any stipulations in reference to advance and allotment of wages, or *other matters not contrary to law.*" (Title 46, U. S. Code, Sec. 564; R. S. Sec. 4511; emphasis added.) Therefore, to be binding upon the master, at least, any collateral agreement to pay wages in addition to those specifically set forth in the Shipping Articles must be set forth in the Shipping Articles.

It has not been decided up to date, to the knowledge of the undersigned proctor, that a shipowner is not entitled to offset against the total amount which might have been due (in addition to the wages agreed to be paid in accordance with the shipping articles) exclusively by reason of a collateral agreement not required by any act of the Congress, such amounts which the shipowner has been required to pay solely by reason of the admitted misconduct of the seaman. For example, if a shipowner enters into a collateral agreement with a seaman and agrees to pay him, in addition to the wages specified in any contract he may make with the master of the vessel, certain bonuses or extra wages in the event he behaves himself throughout the entire term of his employment, Section

4596 of the Revised Statutes (Title 46, U. S. Code, Sec. 701) would not be applicable. A deduction or offset under such circumstances would not be *punishment* for an *offense*. It would be a deduction or offset based exclusively upon the failure of the seaman to perform the conditions precedent to a lawful right to be paid any sum whatever on account of such bonuses or extra wages. These matters were not brought to the attention of the Honorable Harry Westover by the proctors who represented the parties at the trial. In any event they may be considered here on a trial *de novo,* because it is the province of this Honorable Court to render exact justice to the parties and there is no doubt about the proposition that it will do so.

It is therefore respectfully submitted that the Appellant-libelant has failed to prove facts sufficient to entitle him to collect any penalty whatsoever. The statute entitled Judge Westover, in the event he believed that there was good cause shown to set aside the mutual release to "take such action as justice shall require." This certainly authorized the Trial Judge to exercise a judicial discretion. In the exercise of that discretion the Trial Judge decided that the only action which justice required was the rendition of a judgment in the sum of $254.04, with interest at the rate of 7% per annum from June 20, 1952, and costs in the sum of $38.50.

POINT II.

The First Amended Libel Fails to State Facts Sufficient to Constitute a Cause of Action Pursuant to the Provisions of Section 596, Title 46, United States Code.

While the failure to allege facts sufficient to constitute a cause of action may not be available as a point on the *cross-appeal,* it is respectfully submitted that in its role as appellee, there is no impediment to raising this point as defensive matter.

The allegations of fact upon which Appellant-libelant relied in support of his suit are as follows:

> "FOURTH: That on the 18th day of June, 1952, libelant fell ill while the SS 'Canada Bear' was at Yokohama, Japan, and was taken to a hospital for treatment, and was required to remain in said hospital until his vessel had sailed from Yokohama, and by reason thereof, libelant was repatriated to the United States direct from Yokohama, Japan, and did not join his vessel.
>
> "FIFTH: That from the 8th day of May, to and including the 18th day of June, 1952, libelant earned as Wiper on the said S.S. 'Canada Bear,' the sum of $579.24. That libelant drew upon his wages during his employment, the approximate sum of $200.00, but libelant has not been rendered a statement of account, nor has he received any portion of the sum of $379.24, balance of wages earned by him from respondent upon (*sic*) to the date of May 18, 1952." [Tr. Vol. I, pp. 3-4.]
>
> "FOR A SECOND AND DISTINCT CAUSE OF ACTION LIBELANT ALLEGES:
>
> "SEVENTH: Libelant incorporates herein by reference Articles FIRST, SECOND, THIRD, FOURTH, FIFTH,

SIXTH of his First Cause of Action as if fully set forth herein.

"EIGHTH: That pursuant to Title 46, Section 596, U. S. Code, and Title 46, Section 597, U. S. Code, libelant became entitled to all of his wages at the time he left the S.S. 'CANADA BEAR' on June 18, 1952. That none of libelant's wages were left at Yokohama, Japan.

"NINTH: That demand was made upon respondent at San Francisco, California, on the 25th day of July, 1952, for wages due libelant, but payment was refused.

"TENTH: That on the 18th day of June, 1952, prior to the sailing of the S.S. 'CANADA BEAR' from Yokohama, Japan, libelant advised the agent of the S.S. 'CANADA BEAR' that libelant was in the hospital. That said agent advised libelant that he—the agent, would notify the Master of the S.S. 'CANADA BEAR' as to the libelant's whereabouts, prior to the sailing of said vessel. That libelant is informed and believes, and therefore alleges, that the Master of the S.S. 'CANADA BEAR' was advised prior to his sailing that libelant was in the hospital. That notwithstanding the said knowledge upon the part of the Master of the S.S. 'CANADA BEAR,' the said Master refused, failed and neglected to pay to the libelant herein, or to leave with the agent of the S.S. 'CANADA BEAR' at Yokohama, Japan, or to leave with the United States Consul at Yokohama, Japan, the wages due libelant for his services on the S.S. 'CANADA BEAR.'" [Tr. Vol. I, pp. 4-5.]

The first sentence in the Eighth Article is a conclusion of law and does not constitute an allegation of any facts.

By reference thereto, Appellee-claimant incorporates herein all of its argument under Point I, pages 13-19 of

its opening brief as Cross-appellant, already served and filed.

In addition to what is said on this subject in the "Opening Brief of Cross-Appellant" there are other reasons why the first amended libel fails to state facts sufficient to constiute a cause of action pursuant to the provisions of Section 4529, Revised Statutes.

If, as is alleged, the libelant "fell ill" during the course of the voyage and for that reason alone was unable to rejoin his vessel or complete his obligations set forth in the shipping articles, he would have been entitled to an *indivisable* sum of money consisting of the wages he had actually earned up until the time he suffered some illness, in the service of the vessel, plus his unearned wages from the date of the illness up to and including the end of the voyage. This total and indivisible sum could not possibly have been calculated until the actual end of the voyage because the amount of the unearned wages could not have been known until that time.

With reference to statutory rights and remedies, in the case of *Patterson v. Sears-Roebuck & Co.,* 196 F. 2d 947 at 949, the Court states the rule as follows:

> "Those claiming the benefit of them must bring themselves within them. They cannot extend or enlarge them beyond the statute's terms."

With reference to the provisions of Section 4529 of the Revised Statutes, Title 46, U. S. Code, Section 496, the Honorable Learned Hand stated that "the section is penal, and the right *stricti juris.*" (*Petterson v. United States,* 274 Fed. 1000, 1001.)

With reference to the same statute, the United States Court of Appeals, Second Circuit, in the case of *McCrea v. United States,* 70 F. 2d 632, at pages 634-635, states as follows:

> "The statute here involved calls for the payment of double wages, while the Arkansas statute was only for pay at the same rate. The penalty element is just twice as pronounced in this statute. It may well be that such a statute has the dual purpose of compensation and punishment behind it. But, in deciding whether the United States has agreed to be liable for double the pay of a seaman whenever one of its agents violates this statute, we believe the *dominant purpose* of the statute must control and that such purpose is *punishment* for the violation." (Emphasis added.)

Sections 4529 and 4530, Revised Statutes of the United States, (Secs. 596 and 597, Title 46, U. S. Code) are in *pari materia* in so far as the case at bar is concerned and must, therefore, be considered together.

There is nothing whatever within the four corners of these two sections of the Revised Statutes which states that when a vessel sails from a foreign port under the *facts* alleged in the first amended libel that the seaman who has been left behind is within four days thereafter, entitled to the full payment of all wages earned.

The case of *Yoffe v. Calmar Steamship Corporation,* 23 Fed. Supp. 629, 1938 A. M. C. 890, is relied upon by Appellant-libelant in support of his contention that "if on the 19th day of June, 1952, the Master of the 'Canada Bear' sailed the vessel from the port of Yokohama, Japan, leaving libelant behind, and with knowledge that libelant was at the time in the hospital, libelant was discharged

from the service of said ship at the time of its sailing and the entire wages of the libelant become due at that time." (App. Op. Br. p. 29.)

In the *Yoffe* case "The libelant fell ill in the service of the vessel without his fault and was thereby forced to leave the ship on January 20, 1938, at the port of San Francisco, California, where he entered the United States Marine Hospital." His "wages were paid to and including January 20, 1938." Yoffe had signed articles for an inter-coastal voyage from Baltimore, Maryland, to Pacific Coast ports and return.

At the time involved in the *Yoffe* case, Section 4549, Revised Statutes of the United States, Section 641, Title 46, United States Code, provided, in part, as follows:

> "All seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port, or, being of the burden of 75 tons or upwards, *from a port on the Atlantic to a port on the Pacific, or vice versa,* shall be discharged and receive their wages in the presence of a duly authorized Shipping Commissioner . . ., except in cases where some competent court otherwise directs; and any master or any owner of any such vessel who discharges any such seamen belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than $50.00." (Emphasis added.)

It is extremely unlikely that the vessel involved in the *Yoffe* case, the same being a steamship, was of the burden of less than 75 tons. Judge Roche's opinion in the *Yoffe* case makes no reference to Section 4549, Revised Statutes of the United States, and it was probably over-

looked or perhaps it was actually complied with and, for that reason, nothing was said about it in the memorandum opinion.

In the course of his opinion, Judge Roche stated as follows:

> "The circumstances under which the libelant left the vessel, on account of illness, and the payment of wages to the date of his leaving, sufficiently establish that the libelant was discharged from the vessel on January 20, 1938, within the meaning of Section 4529, Revised Statutes."

It is clear from what is actually said in Judge Roche's opinion in the *Yoffe* case that the master of the vessel and the seaman involved mutually and freely agreed that the seaman was to be discharged on January 20, 1938, when he entered the United States Marine Hospital and also mutually and freely agreed at said time that a certain specific sum of money was due him as earned wages and that said agreed sum was paid by the master to the seaman at said time. The cited case is not applicable to the type of situation set forth in the first amended libel in the case at bar. One good and sufficient reason is that no American seaman may be discharged in a foreign country without the consent and approval of the United States Consul at such port.

In the case of *Soumalainen v. Helsingfors Steamship Company,* 1942 A. M. C. 1486, Judge Clancy, United States District Court, Southern District of New York, after setting forth the facts that "on March 13, 1941, libelant was injured on the vessel; was thereafter hospitalized at the Seaman's Hospital . . ." makes the bald statement that "the sailing of the vessel without the

libellant was equivalent to his discharge." The learned Judge cited no authority in support of this conclusion and made no attempt to analyze the provisions of Section 4529, Revised Statutes of the United States, in justification thereof. In any event the decision has nothing whatever to do with what constitutes a discharge of an American seaman in a foreign port during the course of a voyage from a port in the United States to foreign ports and return.

This Honorable Court has decided that the mere fact that a seaman engaged on a foreign voyage becomes ill, goes to a hospital and that the vessel continues on the voyage, leaving him on shore at the hospital, does not constitute a discharge. In the case referred to the seaman was left at Honolulu but that geographical location of what happened would not change the rule in this Circuit that such facts in and of themselves do not amount to a discharge. (*Pacific Mail S. S. Co. v. Lucas,* 264 Fed. 938.)

In the case of *Halvorsen v. United States, et al.,* 284 Fed. 285, the libelant was employed as first engineer on the steamship Higho at the port of Baltimore, February 16, 1921, for a voyage to South America and other ports and back to the home port for a period not exceeding 12 months. On the 28th of May following, at the port of Rio de Janeiro, without his fault, he became ill and was placed in a hospital, where he remained until June 21st following. After discharge by the hospital, he being without funds and being informed that his wages had been left with United States consul, he called upon the consul, who refused to pay any sum unless the libelant accepted the whole sum left by the master as payment in full for the voyage.

It is obvious, from the facts stated by District Judge Neterer, that the ship sailed from Rio de Janeiro with knowledge on the part of the master thereof that the libelant was then in a hospital. Judge Neterer held as follows:

> "The relation disclosed between the libelant, the United States consul, and the ship at the time of the payment of wages at Rio de Janeiro to the date of entrance to the hospital was not that of a discharged seaman.
>
> * * * * * * * *
>
> "The status of the seaman, the discharge contended for, the libelant's arrival at the home port, I think, disclose sufficient cause to challenge the right to double pay under section 4529, R. S. (Comp. St. §8320). This statute is designed for the protection of seamen, to prevent abuses and subjecting a seaman to expense while waiting for settlement. The circumstances in this case do not call for such an allowance."
>
> *Halvorsen v. United States, et al.,* 284 Fed. 285, 287.

Appellant-libelant fails to allege any facts showing that he had completed his shipping agreement or was entitled to his discharge in Japan under any Act of Congress or according to the general principles or usages of maritime law as recognized in the United States.

There is also a complete failure to allege facts showing that any refusal or neglect of the master or owner to pay the earned wages was an *arbitrary* refusal or neglect.

> "But the increased payment for waiting time is not denominated wages by the statute, and the direction that it shall be recovered as wages does not purport to affect the condition prerequisite to its accrual that

refusal or neglect to pay shall be without sufficient cause. The phrase 'without sufficient cause' must be taken to embrace something more than valid defenses to the claim for wages. Otherwise, it would have added nothing to the statute. In determining what other causes are sufficient, the phrase is to be interpreted in the light of the evident purpose of the section to secure prompt payment of seamen's wages (H. R. Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Cong. 2d Sess.) and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed.

"The words 'refuses or neglects to make payment . . . without sufficient cause' connote either conduct which is in some sense arbitrary or willful, or at least a failure not attributable to impossibility of payment. We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, [56] but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible."

Collie v. Fergusson, 281 U. S. 52, 55-56, 74 L. Ed. 696, 698.

It is, therefore, respectfully submitted that the second cause of action, first amended libel, does not state facts sufficient to constitute a cause of action pursuant to the provisions of Section 4529, Revised Statutes of the United States, Section 596, Title 46, United States Code; and that this point may be asserted on appeal because of the established rule that an appeal in a case of admiralty and maritime jurisdiction constitutes a trial *de novo*.

Conclusion.

In the libel it is alleged that "libelant fell ill while the said S. S. 'Canada Bear' was at Yokohama, Japan, and was taken to a hospital for treatment, and was required to remain in said hospital until his vessel had sailed from Yokohama, and by reason thereof . . . did not join his vessel." [Tr. Vol. I, p. 3.] Appellant-libelant did not attempt to prove any of these allegations. In his Opening Brief, page 7, he concedes that "there is no evidence to show why the libelant was hospitalized or how he got there." Appellee-claimant agrees *in toto* with this admission of Appellant-libelant.

There is no reason to discuss Appellant-libelant's argument with reference to the subject of imputed knowledge excepting to call attention to the following matters: 1. The knowledge of the "agent" was not imputed to master of the vessel. 2. The knowledge of the "agent" that Appellant-libelant was in a hospital on June 19, 1952 and was in the same hospital about a week later when the sum of $50.00 was given to him may or may not have been imputed to Appellee-claimant. This would depend upon affirmative proof (not speculation or surmise) that this knowledge was acquired within the scope of the agency. There is no proof that it was within the scope of the "agent's" duties to ascertain where the Appellant-libelant was or why he was where he might have been. There is no proof that it was within the scope of the "agent's" actual duties to pay to Appellant-libelant any sum whatever. If the "agent" volunteered to pay the $50.00 with the

hope that he would be reimbursed, knowledge of the act of payment would not be imputed to the Appellee-claimant.

If, which is vigorously disputed, the Appellant-libelant was discharged by the *master* when the vessel sailed without him at 1600 hours on June 19, 1952, it was obviously impossible for the *master* to have personally paid Appellant-libelant any wages in United States currency or gold (Sec. 4548, Rev. Stat.), or at all, within four days after the time of sailing because the master was obviously at sea and the seaman was in Japan during this entire period. There is no statute or case law known to the undersigned proctor which required the master of the vessel to delay the sailing of the vessel in order to go to the hospital where the seaman was confined even if he had possessed actual knowledge of the fact that he was there. It is the master of the vessel who is the agent of the shipowner charged with the duty of discharging and paying off seamen in foreign ports. There is no evidence in the record which would support a finding that the said master refused or neglected, without sufficient cause, to pay any wages within four days after the exact minute that the seaman became "absent without leave" or wtihin four days after he failed to return to the vessel before its scheduled and actual sailing time.

It does not seem right that the Appellant-libelant is entitled to complain about the alleged failure of the trial judge to make findings with reference to any particular element. The record shows that *his* proctor prepared the

findings of fact and submitted them to the trial judge for signature; that the proposed findings were not approved either as to form or substance by any proctor for the Appellee-claimant; and that the *findings* as *proposed* were signed without any alteration by the trial judge.

It is respectfully contended that the Appellant-libelant is not entitled to any relief at the hands of this Honorable Court.

Respectfully submitted,

LASHER B. GALLAGHER,

Proctor for Appellee-Claimant.